

CHINA'S EMPLOYMENT DISCRIMINATION LAWS DURING ECONOMIC TRANSITION

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I. INTRODUCTION

While working as a consultant to the World Bank on China's labor legislation in 1996, I was waiting outside the gate of the Ministry of Labor, when I noticed a job advertisement posted on a pole. It read,

Seeking an office clerk. Female, decent height and appearance. All five facial organs must be in the right place (*wu guan duan zheng*).¹

In 2005, job advertisements with identical facial requirements are widely seen. That, of course, is but one frank articulation of what many employers around the world take note of in the employment hiring process. Other factors in considering applicants and employees in China may include sex, ethnicity, social origin, health, disability, age, or migrant status, some of which are considerations prohibited by Chinese labor laws.²

This article describes the current status of the above factors as used in human resource management (HRM) practices during China's current economic transition, and further examines China's existing anti-discrimination labor legislation. Some comparative references are made to labor standards under International Labor Organization (ILO) Conventions and U.S. legislative approaches. This article further suggests areas for legal reform to both clarify coverage and enhance enforcement and remedies, which would in turn arrest some of the more pernicious illegal hiring and employment practices currently found in China's HRM.

In addition to obtaining justice for the victims of improper HRM practices, there are several underlying inquiries for China to consider. These include (1) the social and economic costs and consequences resulting from a failure to address issues of employment discrimination,

¹ Though the Chinese disagree on which organs constitute the "five sense organs," they have been defined as "ears, eyes, lips, nose, and tongue," and mean "regular features; pleasant-looking face with the five organs in normal shape and position." THE ABC ENGLISH-CHINESE COMPREHENSIVE DICTIONARY 1004 (John DeFrancis et al. eds., 2003).

² See Jing Tao, *Gender Discrimination in the Chinese Labor Market is Severe* (Apr. 12, 2005) (unpublished manuscript, on file with author); 酒店招工听口音, 未聘用只因方言不地道 [*Hotel Rejected Job Applicant For Speaking Tongue-Tied Dialect*], 北京青年报 [BEIJING YOUTH DAILY], Feb. 11, 2004, at 6, available at <http://edu.sina.com.cn/1/2004-02-12/60863.html> [hereinafter *Tongue-Tied Dialect*]; 尚水, 就业歧视案例聚焦 [Shang Shui, *Cases on Employment Discrimination*], 人民日报 [PEOPLE'S DAILY], June 15, 2005, at 15, available at <http://legal.people.com.cn/GB/42731/3469925.html> [hereinafter *Shang Shui*]; 炒掉百名乙肝患者惹纠纷 [*Dispute Arises When Employer Fired Hundreds of Hepatitis B Carriers*], 信息时报 [INFO. CHRON.], Apr. 1, 2004, at D03 [hereinafter *Dispute Arises*].

inequality, and impediments to equal employment opportunity, and (2) whether there is sufficient national commitment to simultaneously seek alternatives to end these problems, while balancing and advancing economic development interests.

II. CHINA'S CURRENT CONDITIONS AFFECTING HUMAN RESOURCES MANAGEMENT

A. *Economic Transition to a Socialist Market Economy*

In the late 1980s, the economic developments following the Four Modernizations of 1979 produced workplaces that were increasingly regulated by labor contracts, displacing the "iron-rice bowl" model of earlier years.³ The transition to a socialist market economy in the 1990s coincided with a growing assumption of managerial control for employers.⁴ Due to market forces, employers were forced to maximize profits if they hoped to survive without government subsidies of the former planned economy, and lawmakers responded by allowing greater employer autonomy. This liberalization of employee management tended to result in employers cutting labor costs, and, all too frequently, ignoring labor laws. This trend was particularly prevalent among employers outside of the state-owned enterprise (SOE) system.

This market transition has had both positive and negative economic consequences. One bright side has been phenomenal economic growth and development for the country as a whole; however, a dark side has been its impact on individual workers, including layoffs, unemployment, and emerging wage disparities. These disparities are found in dramatic wage level differences between urban and rural workers as well as between regions—especially between the Special Economic Zones (SEZs) in the coastal areas and the non-SEZs in the Western inland provinces.⁵ Large wage disparities also exist, as they do

³ Jaeyoun Won, *Withering Away of the Iron Rice Bowl? The Reemployment Project of Post-Socialist China*, 39 STUD. IN COMP. INT'L DEV. 71, 71 (2004). See also Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China*, 19 BERKELEY J. INT'L L. 161, 208 (2001).

⁴ Victor Nee & Yang Cao, *Market Transition and the Firm: Institutional Change and Income Inequality in Urban China*, 1 MGMT. & ORG. REV. 23 (2005). See also Jonathan P. Hiatt & Deborah Greenfield, *The Importance of Core Labor Rights in World Development*, 26 MICH. J. INT'L L. 39, 40 (2004).

⁵ See generally Bjorn Gustafsson & Li Shi, *The Anatomy of Rising Earnings Inequality in Urban China*, 29 J. COMP. ECON. 118 (2001). See also Cliff Waldman, *The Labor Market in Post-Reform China: History, Evidence, and Implications*, 39 BUS. ECON. 50, 54-56 (2004).

in many countries, between management officers and workers.⁶ According to former World Bank President Wolfenson, these wage gaps are increasing at an alarming rate, and he warns that history suggests such gaps could lead to social unrest and protests.⁷

These economic disparities in China's labor force affect certain cohorts of workers more than others, both as a result of socio-economic factors and because of illegal discrimination. This discrimination occurs primarily against women, migrant workers, national ethnic minorities, and workers perceived to have health problems or disabilities. For example, women in China working at urban jobs earn only about 70% of what men make for similar work, and female executive and senior professionals earn about 58% and 68% of their male counterparts, respectively. Further, professional fields are generally comprised of only about 20% women, and female doctors earn about 63% of the amount earned by male doctors.⁸

Women are not alone in their fight against employment discrimination. Another group of citizens affected by the China's economic transition is its "floating population" of some 100 to 150 million migrant workers moving from poor rural areas to developed urban areas seeking better job opportunities.⁹ Recently, much attention has been given to their plight, as millions either go unpaid or are grossly underpaid—in violation of labor laws—and are otherwise discriminated against because of their migrant status.

Health discrimination for those with hepatitis B is another common area of employment discrimination in China. It has been reported that "up to 120 million Chinese people, a number equivalent to

⁶ 国务院发展研究中心[The Development Research Center of the State Council], 中国企业人力资源管理调查报告 [Report of Chinese Enterprises on Human Resource Management] (2004), cited in 老总员工收入差距最大超 50 倍 [Manager Earns Fifty Times More than Staff], 广州日报 [GUANGZHOU DAILY], Apr. 25, 2004, at A2, available at http://gzdaily.dayoo.com/gb/content/2004-04/25/content_1517025.htm.

⁷ David Murphy, *The Dangers of Too Much Success*, 167 FAR E. ECON. REV. 28, 28-29 (2004). The Chinese Government has taken notice of the increase in mass protests. It is reported that Zhou Yongkang, the Public Security Chief and State Councilor, stated that the "rising conflicts among the people" had been triggered by domestic economic factors, the behaviour of cadres, and by a lack of justice" with the number of mass protests increasing from about "10,000 in 1994 to more than 74,000 last year [2004]". Shi Ting, *Acceptance of Rights Replacing Reflex Fear of Protests*, S. CHINA MORNING POST, July 7, 2005, at 1.

⁸ Margaret Maurer-Fazio & James Hughes, *The Effect of Institutional Change on the Labor Market Outcomes of Chinese Women: Traditional Values vs. Market Forces* (1999) (unpublished paper), cited in Elizabeth Brainerd, *Women in Transition: Changes in Gender Wage Differentials in Eastern Europe and the Former Soviet Union*, 54 IND. & LAB. REL. REV. 138, 162 (2000). In the U.S. the figure for relative wage disparity is 76% for blacks versus whites, and 64% for Hispanic women. *Id.* at 146 (2000).

⁹ *China's Floating Population Exceeded 10% of Total Population*, 中国新闻网 [CHINANEWS.CN], Jan. 6, 2005, at <http://www.chinanews.cn/news/2004/2005-01-06/772.shtml>.

the total population of France and Britain combined, are thought to be carriers of the disease.”¹⁰ It is also reported that some twenty-two diseases, such as severe heart disease and high blood pressure, disqualify people from being hired for public office.¹¹ There are also nearly one million HIV/AIDS carriers in China against whom employers also discriminate.¹²

Lastly, China has roughly 100 million citizens it classifies as ethnic minorities,¹³ whose economic status is often lower than other Chinese. When they seek to migrate outside of their communities for better jobs, they face possible discrimination not only for their minority status, but also for their social status as rural citizens.¹⁴

B. Human Rights Management Practices in China

1. Regulation of Labor Market Management

As China relaxed its socialist planned economy and moved toward a free market, the systems of government placement and allocation of personnel from colleges and elsewhere were modified, giving way to current hiring practices based largely on self-selection.¹⁵ With the demise of the “iron-rice bowl,” children no longer “inherited” their parents’ factory job, and workers no longer enjoyed job security; and with that trend came the new practice of HRM, consisting of recruitment,

¹⁰ Liang Chao, *Law Drafted to Fight Hep B Discrimination*, CHINA DAILY, Aug. 11, 2004, at <http://www.china.org.cn/english/government/103598.htm>.

¹¹ *Id.*

¹² Hong Kong Liaison Office of the International Trade Union, *HIV/AIDS in China: A Workers Issue*, <http://www.ihlo.org/LRC/SW/001004b.html> (last visited Feb. 27, 2006).

¹³ 中共中央统一战线工作部 [The United Front Work Department of CPC Central Committee], 中国民族的基本特点 [Basic Characteristics of Chinese Nationalities], <http://www.zytzb.org.cn/ssmz/ziliao/ssmz12.htm> (last visited Feb. 1, 2006).

¹⁴ Due to economic pressure, ethnical minorities from the remote countryside are migrating to big cities to look for employment opportunities. This group of workers can be classified as both minorities and migrants. It is likely they face further discrimination based on their status as migrants, in addition to their ethnicity. For a general discussion, see 新疆区统计局 [Xinjiang Bureau of Statistics], 转移农村劳动力是解决新疆“三农”问题的根本出路 [To Transfer Peasant Labor Is The Fundamental Solution to Xinjiang's Three Main Problems In Villages], 中国统计信息网 [CHINA STAT. INFO. WEB], Aug. 31, 2005, <http://www.stats.gov.cn/was40/detail?record=286&channelid=33728>.

¹⁵ *China's Employment Market Challenged by Two Million Graduates*, PEOPLE'S DAILY, Jan. 10, 2003, http://english.people.com.cn/200301/10/eng20030110_109906.shtml.

hiring, employment, and termination.¹⁶ The Chinese labor force soon discovered that employment decisions were not always based on merit or even political color (i.e. Chinese Communist Party membership). In 2005, employment discrimination under this new system of employer autonomy came to the point where even a delegate to the National People's Congress (NPC) proclaimed,

A law on fair employment is an urgent need in China
A harmonious society should give adequate space to
talents competing on an equal footing and developing . . .
their capability to the full . . . waste of any human
resources does not facilitate economic and social
development.¹⁷

The current HRM hiring route is multi-faceted, and usually involves advertising for positions (rather than having labor supplied through labor bureaus), word of mouth, use of labor supply brokers (including labor bureaus and employment agencies), and posting notices on walls and the Internet. Special rules, however, still apply to foreign-invested enterprises (FIEs), as will be discussed *infra*. With the exception of civil service jobs and jobs needing certain proficiencies, recruitment does not usually require testing.¹⁸ Employment and working conditions are usually governed by the employer and its rules, with the employer authorized to make evaluative decisions. Both, however, are limited

¹⁶ Won, *supra* note 3, at 71. See also Mary E. Gallagher, "Time is Money, Efficiency is Life": The Transformation of Labor Relations in China, 39 *STUD. IN COMP. INT'L DEV.* 3, 11-44 (Summer 2004). See generally, Ying Zhu and Malcolm Warner, *Changing Patterns of Human Resource Management in Contemporary China: WTO Accession and Enterprise Responses*, 35 *INDUS. REL. J.* 311, 311-28 (2004).

¹⁷ Deputy Wang Yuan'an from Tai'an City in East China's Shandong Province, cited from NPC Deputy Proposes Law against Employment Discrimination, 人民网 [PEOPLE'S DAILY ONLINE], Mar. 4, 2005, http://english.people.com.cn/200503/04/eng20050304_175554.html. For other calls for legislation, see 凌锋, 反对就业歧视, 法律不应沉默 [Ling Feng, Law Shall Not Be Silent Against Employment Discrimination], 法制日报 [LEGAL DAILY], June 20, 2005, at 5. As of July 2005, there is consideration on an Employment Promotion Law that may contain anti-discrimination provisions. 就业促进法 [Employment Promotion Law] (Tentative Draft 2005) (P.R.C.) (on file with author) [hereinafter Employment Promotion Law Draft].

¹⁸ See 中华人民共和国公务员法 [Civil Service Law] arts. 21-32 (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 27, 2005, effective Jan. 1, 2006) (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=101410. See Robert Taylor, *China's Human Resource Management Strategies: The Role of Enterprise and Government*, 4 *ASIAN BUS. & MGMT.* 5, 11-18 (2005).

Commercial services are available in China for pre-employment screening. See, e.g., Inquest Pre Employment Screening Service, at http://www.inquestscreening.com/international_asia.asp (last visited Feb. 28, 2006).

somewhat by labor laws, labor contracts, and collective contracts.¹⁹ Dismissals and other labor disputes are regulated by statutes and generally are resolved intra-enterprise by mediation or by resort to government labor arbitration commissions and tribunals, with de novo review provided by the courts.²⁰

In 2000, the Ministry of Labor and Social Security (MOLSS) sought to regularize and bring more order to labor market management by issuing its Regulations on Labor Market Management (hereinafter Labor Market Regulations).²¹ Its stated purpose is to protect the legal interests of employees and employers, to develop and standardize the labor market, and to promote employment.²² The Labor Market Regulations apply to the laborer's job application and work, the employer's recruiting process, and to the "career introduction activities" of job centers.²³ The Regulations are administered by the labor bureaus above the county level.²⁴

The regulations relating to recruitment²⁵ provide for "public and fair competition,"²⁶ and states that employers can acquire employees in numerous ways, including the use of job centers and advertising in the mass media.²⁷ Interestingly, Article 9 requires employers placing ads for vacancies in the mass media to first obtain the approval of the local labor security administrative authorities.²⁸ The Regulations also prohibit a number of well-documented employer abuses, including charging the

¹⁹ 中华人民共和国劳动法 [Labor Law] art. 19(2) (promulgated by Standing Comm. Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995) (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=20195; 劳动合同法规定 [Provisions on Collective Contract]

art. 8 (promulgated by the Ministry of Labor and Social Security, Jan. 20, 2004, effective May 1, 2004) (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=91497.

²⁰ 劳动部关于实行劳动合同制度若干问题的规定 [Regulation of the Ministry of Labor on Institution of Labor Contract System] art. 14 (promulgated by the Ministry of Labor, Oct. 31, 1996, effective Oct. 31, 1996) (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=26814; 浅谈民商仲裁与劳动仲裁的司法监督 [Some Opinions on the Judicial Review of Commercial Arbitration and Labor Arbitration], 中国劳动 [CHINA LABOR], May 2003, at 25 [hereinafter *Some Opinions*].

²¹ 劳动力市场管理规定 [Regulations on Labor Market Management] (promulgated by the Ministry of Labor and Social Security, Dec. 8, 2000, effective Dec. 8, 2000) (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=36355 [hereinafter Regulations on Labor Market Management].

²² *Id.* art. 1.

²³ *Id.* art. 2.

²⁴ *Id.* art. 4: The hired person also must register with the Labor Bureau within 30 days of being hired. *Id.*

²⁵ *Id.* arts. 7-14.

²⁶ *Id.* art. 7.

²⁷ *Id.* art. 8. These ways include (1) entrusting a job center; (2) participating in labor exchanging activities; (3) publishing advertisements for employers in mass media; (4) recruiting on the Internet; and (5) other means stipulated by laws and regulations. *Id.*

²⁸ *Id.* art. 9.

hired person a deposit fee or holding worker documents such as identity papers.²⁹

The most significant provision in Labor Market Regulations is Article 11, which bans employment discrimination in recruitment. It reads: “[w]hile hiring a person, the employer shall not refuse to hire or enhance the hiring standard on the basis of gender, nationality, race, or religion, except those provided by state laws concerning unsuitable types of work or positions.”³⁰

The Labor Market Regulations also cover “career recommendation organs,” or employment services and agencies, both non-profit and for-profit.³¹ Article 21 is of significance, as it prohibits career recommendation agencies from certain activities including “recommending jobs prevented by laws and regulations”.³² This would seem to ban recommendation of a job advertised by an employer as “for men only,” where there is no legal basis for a sex-specific limitation.³³

Sanctions for violations of these regulations provide for general fines of ¥1,000 (for violations of Article 10 or 14), and fines ranging from ¥10,000 to ¥30,000 for a violation of several enumerated articles, including Article 21.³⁴ Penalties may also include revocation of the employer’s business license.³⁵ Of greatest significance, however, is the absence of sanction for violations of Article 11 prohibitions on employment discrimination.

In 2001, the Ministry of Personnel and the State Administration for Industry and Commerce issued the Rules on the Administration of Human Resources Markets (hereinafter Rules on HRM).³⁶ These rules apply to the administration of labor agency services, including the general hiring activities of employers and the treatment of individual job applications.³⁷ Article 3 mandates that “human resource market activities must abide by the laws, regulations, and policies of this country, persist in

²⁹ *Id.* art. 10(4)-(5).

³⁰ *Id.* art. 11.

³¹ *Id.* arts. 15-25.

³² *Id.* art. 21.

³³ See 中华人民共和国广告法 [Advertisements Law] art. 7(7) (promulgated by the Standing Comm. of the Nat’l People’s Cong., Oct. 27, 1994, effective Feb. 1, 1995), 1994 全国人民代表大会常务委员会公报 [STANDING COMM. NAT’L PEOPLE’S CONG. GAZ.] (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=20976 (banning discriminatory advertising by stipulating the ad shall not contain any racial, ethnic, gender, or religious discrimination language).

³⁴ The Regulations on Labor Market Management, *supra* note 21, at arts. 34-38. Article 10 prohibits false information etc., and article 14 requires registration of employees. *Id.* arts. 10, 14.

³⁵ *Id.* art. 37.

³⁶ 人才市场管理规定 [Rules on the Administration of Human Resources Market] (promulgated by the Ministry of Personnel, Sept. 11, 2001, effective Oct. 1, 2001, revised Mar. 22, 2005) (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=101542.

³⁷ *Id.* art. 2.

the principles of openness, equality, competition, and selection of the best
 „³⁸

The agencies are required to have the “capacity to independently bear civil liabilities; and sanctions are provided for violations, ranging from ¥10,000 to ¥30,000.³⁹ Of greatest significance is Article 39, which provides

Any employing unit that, in violation of these Rules, refuses to recruit talents or heightens the qualifications for these talents by such reason as *nationality, sex, and religion* or recruits personnel who should not be recruited . . . shall be ordered to make corrections by the administrative department in charge of personnel of the people's government . . . if the circumstances are serious, there shall be imposed a fine of less than ¥10,000.⁴⁰

FIEs⁴¹ have special requirements that apply to all employees, including expatriates and personnel from Taiwan, Hong Kong, and Macao.⁴² Additionally, there are special rules on the employment of foreigners in China, including the requirement that their employer must obtain employment permission.⁴³

Since Chinese labor laws apply to FIE employees,⁴⁴ many FIEs have developed a practice whereby foreign employees sign employment contracts that stipulate that the law of the enterprises' home country will

³⁸ *Id.* art. 3.

³⁹ *Id.* arts. 6(4) and 35.

⁴⁰ *Id.* art. 39 (emphasis added).

⁴¹ These include China-foreign joint equity ventures, China-foreign cooperative ventures, wholly foreign-owned enterprises, and China-foreign joint stock limited companies. 外商投资企业劳动管理规定 [Provisions on the Labor Administration in Enterprises with Foreign Investment] art. 2 (promulgated by the Ministry of Labor & the Ministry of Foreign Trade & Econ. Coop., Aug. 11, 1994, effective Aug. 11, 1994), 14 P.R.C. LAWS & REGS V-05-00-303, available at http://www.chinacourt.org/flwk/show1.php?file_id=20454.

⁴² 劳动部关于贯彻外商投资企业劳动管理规定有关问题的复函 [Reply of the Ministry of Labor on Relevant Issues Regarding the Implementation of Provisions on Labor Administration in Enterprises with Foreign Investment] art. 1 (promulgated by the Ministry of Labor, July 14, 1995, effective July 14, 1995) (P.R.C.), available at http://www.chinacourt.org/flwkshow1.php?file_id=23070.

⁴³ 外国人在中国就业管理规定 [Regulations on the Management of Employment of Foreigners in China], art. 5 (promulgated by the Ministry of Labor and Pub. Sec., Jan. 22, 1996, effective May 1, 1996) (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=24485 (available by subscription only).

⁴⁴ Jeremy B. Fox et al., *Beyond the Image of Foreign Direct Investment in China: Where Ethics Meets Public Relations*, 56 J. BUS. ETHICS 317, 317 (2005).

govern.⁴⁵ In 2003, new provisions were issued regulating the management of intermediary employment agencies servicing FIEs.⁴⁶ These provisions require any FIE using intermediary services to conduct its “activities through a specialized job intermediary agency jointly established with a Chinese company, enterprise or other economic organization for offering job intermediary services.”⁴⁷ These agencies are authorized to collect data about the employment market, provide job recommendations, conduct recruitment activities, job testing and appraising, and provide training courses.⁴⁸ They must abide by “the principles of voluntary participation, equity and good faith.”⁴⁹ Sanctions are outlined, ranging from fines of ¥10,000 to ¥30,000, to loss of business license.⁵⁰

Other HRM policies for FIEs fall under the 1994 Regulations. For recruitment, FIEs, including representative offices, are allowed to use the labor services of an intermediary agency to hire Chinese employees.⁵¹ These policies also regulate wage equities between Chinese and foreign personnel and embrace the requirement of equal pay for equal work.⁵² Two regulations related to this area were promulgated in 1997 by the Ministry of Labor: the Measures for the Trial Enforcement of the Guidelines for Wage Level System in Pilot Areas and the Provisional Measures for the Administration of Wage Income in Foreign-Invested Enterprises.⁵³

In sum, the Chinese government is seeking to regularize and standardize HRM practices in China through labor market regulation. However, the government is still struggling to respond to persistent claims of inequality and inadequate legislative remedies.

⁴⁵ *More Foreign Employees Working in Shanghai*, CHINA STAFF, Jan. 2005, at 34.

⁴⁶ 中外合资人才中介机构管理暂行规定 [Interim Provisions Concerning the Management of Chinese-foreign Joint Job Intermediary Agencies] (promulgated by the Ministry of Personnel, the Ministry of Commerce and State Administration for Industry & Commerce, Sept. 4, 2003, effective Nov. 11, 2003) (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=89004.

⁴⁷ *Id.* art. 3. Wholly foreign-owned job intermediary agencies are prohibited. *Id.*

⁴⁸ *Id.* art. 11.

⁴⁹ *Id.* art. 12.

⁵⁰ *Id.* arts. 16-18.

⁵¹ Provisions on the Administration of Labor in Foreign-Invested Enterprises, *supra* note 41, at art. 5.

⁵² *Id.* art. 14.

⁵³ 试点地区工资指导线制度试行办法 [Measures for the Trial Enforcement of the Guidelines for Wage Level System in Pilot Areas] (promulgated by the Ministry of Labor, Jan. 30, 1997, effective Jan. 30, 1997) (P.R.C.), available at <http://www.molss.gov.cn/correlate/lbf199727.htm>; 外商投资企业工资收入管理暂行办法 [Provisional Measures for the Administration of Wage income in Foreign-Invested Enterprises] (promulgated by the Ministry of Labor, Feb. 14, 1997, effective Feb. 14, 1997) (P.R.C.), available at <http://www.molss.gov.cn/correlate/lbf199746.htm>.

2. Workplace Discrimination: Anecdotal Glimpses

Inequality and discrimination against different categories of employees occur in every society. China is interesting both because of the diversity of workers reportedly facing obstacles to equal employment opportunities, and because of the sheer size of its labor force. That size makes the number of workers within each category economically significant in terms of the potential waste of capable and employable human resources. Categories of reported victims of discrimination include gender, race, ethnicity, health, disability, religious belief, age, height, and migrant status.⁵⁴

While it is true that anecdotal incidents of employment discrimination can be isolated and atypical, they also may represent wider patterns of practice; the question of which it actually is should be left for further study by government and social scientists. This study attempts to show only that there are winds of activity blowing, ringing a bell of concern. That concern, raised by the anecdotal glimpses which follow below, should prompt discussion and analysis as to the current status of China's anti-discrimination employment laws.

a. Gender

In 1955, Mao Zedong said,

Enable every woman who can work to take her place on the labor front under the principle of equal pay for equal work. This should be done as soon as possible.⁵⁵

In 1990, China ratified the ILO Convention on Equal Remuneration for Equal Work⁵⁶ and, with subsequent legislation and government policies discussed below, sought to curb gender discrimination in many areas of society, including education, political

⁵⁴ See Tao, *supra* note 2; *Tongue-Tied Dialect*, *supra* note 2; Shang Shui, *supra* note 2; and *Dispute Arises*, *supra* note 2.

⁵⁵ JOHN DEFRANCIS, ANNOTATED QUOTATIONS FROM CHAIRMAN MAO 136 (1975); and see *Equality Called for Women*, CHINA DAILY, July 2, 2004, available at <http://www.china.org.cn/english/China/100112.htm>.

⁵⁶ International Labour Organization, *Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, 165 U.N.T.S. 32 (1951). For ratification status, see <http://www.ilo.org/ilolex/cgi-lex/ratificc.pl?C100>.

office and economic opportunity.⁵⁷ Nonetheless, wage disparities between men and women remain, with urban women earning about seventy cents for every dollar earned by men for similar work and rural women earning less than sixty cents per dollar earned by their male peers.⁵⁸ The MOLSS reported that an investigation of sixty-two selected cities “clearly shows that 67% of the work units set gender limits and expressly stipulate in writing that females must not become pregnant or bear children during the term of their employment.”⁵⁹

The All China Federation of Trade Unions (ACFTU) has reported some of the stark conditions women face in the workplace.⁶⁰ The ACFTU compiled information gathered between 1978 and 2002, and found reforms and transition to a market economy were less kind to women workers and, among other findings, noted that the layoff of women occurs at a significantly higher percentage than men.⁶¹ In addition, women were reported to find reemployment at only a 39% rate,

⁵⁷ U.N. Committee on the Elimination of Discrimination against Women, 20th Sess., *Third and Fourth Periodic Reports of States Parties*, 2-9, U.N. Doc. CEDAW/C/CHN/3-4 (1997). In a recent report by the United Nations Committee on Economic, Social and Cultural Rights reviewing China's report on its implementation of Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 64, U.N. Doc. A/6316 (1966), the Committee, in its Concluding Observations, included as one of its “Principles of Concerns,” “the persistence of gender inequalities in practice in the State party, particularly with regard to employment and participation in decision-making. Article 16 of the Covenant requires State Parties of the Convention to submit periodical reports to the Secretary-General of the United Nations, on the measures which they have adopted and the progress made in achieving the observance of the rights recognized under the Convention. Article 17 further requires that reports may indicate factors and difficulties affecting the degree of fulfillment rights recognized under the Convention, and reports shall have a precise reference of information. International Covenant on Economic, Social and Cultural Rights, arts. 16-17, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 64, U.N. Doc. A/6316 (1966). The Committee regrets that it has not received sufficient information from the State party regarding affirmative action to promote gender equality and measures to prevent sexual harassment in the workplace.” U.N. Committee on Economic, Social and Cultural Rights, 34th Sess., *Concluding Observations of the Committee on Economic, Social and Cultural Rights People's Republic of China*, at 3, U.N. Doc. E/C.12/1/Add.107 (2005) [Hereinafter *U.N. Concluding Observations*]. It recommends “the State party to undertake effective measures to ensure the equal right of men and women to enjoy economic, social and cultural rights as provided for in Article 3 of the Covenant, including through implementing the principle of equal pay for work of equal value, the elimination of wage gaps between men and women, and providing equal opportunities for both men and women.” *Id.* at 7.

⁵⁸ U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2004), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41640.htm> (last visited Feb. 27, 2006) [hereinafter *State Dept. Rpt.*].

⁵⁹ Tao, *supra* note 2.

⁶⁰ The report, cited in CHINA DAILY, was compiled after studying information gathered between 1978 and 2002, on the working lives of female workers in Shanghai, Chongqing and provinces such as Liaoning, Jiangsu, Zhejiang, Guangdong and Gansu. It found that as reforms have been implemented in the transition to a market economy, industries such as the textile sector and some other female-dominated areas have sustained large-scale layoffs. Not surprisingly, a disproportionate number of women were laid off. See *Equality Called for Women*, *supra* note 55.

⁶¹ *Id.*

compared with men at 63.9%.⁶² The study found that between 1990 and 2000—the early years of market transition—the wage gap between female and male workers dropped from 77.5% to 70.1%.⁶³ In 2002, “there were twice as many women [as men] in jobs below the ¥500 (approximately US\$60) monthly income level, with 1.5 times as many men holding ¥2,000 (approximately US\$240) jobs as women.” In addition, women were said to hold only 1.3% of management posts in all organizations during 2002.⁶⁴ The ACFTU Report concluded that “problems faced by female employees result from the influence of [a] market economy and society.”⁶⁵ Of course, there are in fact many factors that cause inequality in society, including education level, experience, qualifications, and an employers’ intention to discriminate.

Recent female college graduates have indicated their frustration while looking for jobs. It is said to be “an open secret in China that female college graduates suffer discrimination from employers when applying for jobs, with the inequality known to almost all college students, including graduate students.”⁶⁶ Some graduates have even opted to include revealing photos—some wearing bikinis or short skirts—on their resumes.⁶⁷

The ACFTU Report showed that many employers, in clear violation of labor laws, refused to issue labor contracts to women workers, especially younger women. These employers often required them to work long overtime hours, ranging from seventy-six to ninety hours per week, and assigned female workers to hazardous jobs in violation of labor laws.⁶⁸ The Report stated,

⁶² *Id.* The All China Federation of Women (ACFW) confirmed these findings in its own report, cited in *Equality Called for Women*, *supra* note 60.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Xing Zhigang, *Job Hunt a Battle for Female Grads*, CHINA DAILY, Apr. 3, 2004, available at http://www.chinadaily.com.cn/english/doc/2004-04/02/content_320244.htm.

⁶⁷ *Id.* Xiaqo Yu, a female undergraduate at Beijing Normal University reports that her job searches at job fairs and elsewhere were often met with “[I]f only you were a boy.” Reportedly, it is not uncommon for employers to openly state their requirement or preference for male applicants and this attitude is enhanced by the usual age of a female college graduate, which, at 22, is thought by some employers to be entering their time for marriage and family. A personnel manager at a Beijing electronics firm reportedly stated his view that “employing more women will push up our production cost because female workers have to be given pregnancy and maternity benefits in line with labour laws.” *Id.*

⁶⁸ Wang Zhiyong, *Women in the Workplace: A Great Leap Backward*, 中国网 [CHINA.ORG.CN], (Mar. 22, 2004), available at <http://www.china.org.cn/english/2004/Mar/90950.htm>. This source, China Internet Information, is under the auspices of China International Publishing Group and State Council Information Office.

Non-SOEs very rarely provide maternity benefits, nor do they accommodate the special needs of women during menstrual periods, pregnancy, or after the birth of a child. Some female employees still work high above the ground or in low temperatures, or carry out hard physical labor while menstruating. Women who are seven months pregnant are scheduled to work night shifts in some factories.⁶⁹

The ACFTU Report concludes by noting that “sex discrimination is the norm in today’s workplace. The progress made in the early decades of the PRC has in many cases been abandoned in the years since economic reform began.”⁷⁰

An increasing number of sexual harassment cases are now being brought before the courts in China.⁷¹ With some 86% of women in a recent survey by the Beijing-based China Times newspaper identifying themselves as “victims of sexual harassment” in the workplace, in public transportation, and in hospitals, a draft amendment to outlaw sexual harassment was introduced to the NPC Standing Committee in June 2005, and was enacted into law on August 28, 2005.⁷²

b. Migrant Workers

Appearing to urbanites as aimless and ominous as errant waters, China’s sojourning peasant transients in the cities are outsiders, out of place. In their millions, they seem to city folk and their supervisors to be streaming in, as if incessantly, out of control. In the minds of their metropolitan detractors, they are aptly labeled: they are unrooted noncitizens, wanderers; they are the elements of the “floating population.”⁷³

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Wang Ying, *Women to Get Protection From Harassment*, CHINA DAILY, Mar. 5, 2005, available at http://www.chinadaily.com.cn/english/doc/2005-03/05/content_421943.htm.

⁷² *Id.*; *An Epic Struggle Against Sexual Harassment*, CHINA DAILY, Aug. 29, 2005, at 5, available at <http://www.china.org.cn/english/China/140117.htm>; Liu Li, *Revised Law Aims to Protect Women’s Rights*, CHINA DAILY, June 27, 2005, at 1, available at http://www.chinadaily.com.cn/english/doc/2005-08/29/content_472897.htm.

⁷³ DOROTHY J. SOLINGER, *CONTESTING CITIZENSHIP IN URBAN CHINA: PEASANT MIGRANTS, THE STATE AND THE LOGIC OF THE MARKET* 1 (1999) (footnotes omitted).

The number of migrant workers flowing between the rural and urban locations of China is estimated to be at least 130 million,⁷⁴ and some project that this number will reach 300 million by 2010.⁷⁵ The 2000 census figures reported that 65% of the flow was intra-province, with young and middle-aged people between fifteen and thirty-five years of age constituting more than 70% of all migrant workers.⁷⁶ Much of the movement is a result of China's transition to a market economy and its relaxation of the household registration (*hukou*) system which prior to the reforms had restricted citizen movement.⁷⁷

Migrant workers eager for better wages travel to urban areas to find jobs better than those available near home. Urban centers have many such jobs and the labor of migrant workers contributes to China's economic development and its transition to a market economy. Despite this economic contribution, many stories have emerged that highlight how migrant workers are often taken advantage of in the workplace: migrant workers are often given dirty, difficult, and dangerous jobs, made to work under sub-standard working conditions, or sometimes not paid for months at a time.⁷⁸

Many hardships exist for such workers who are far from home and in need of money.⁷⁹ Certainly, migrant workers' lack of awareness of their legal rights combined with urban employers' HRM methods, illegal practices of withholding wages, overtime pay, and long working hour requirements, all contribute to workplace discrimination against migrant workers. This migrant status can arguably be associated with one's

⁷⁴ *Reforms of China's Household Registration System Underway*, 中国网 [CHINA.ORG.CN], available at <http://www.china.org.cn/baodao/english/newsandreport/2002sep1/18-4.htm> (last visited Feb. 23, 2006). See also, *China's Floating Population Exceeded 10% of Total Population*, *supra* note 9. Other estimates put the figure at 140 million in 2003, rising from 70 million in 1993. *Id.*

⁷⁵ David Lague, *The Human Tide Sweeps into Cities*, 166 FAR E. ECON. REV. 24, 25 (2003).

⁷⁶ *Id.*

⁷⁷ For discussion of the *hukou* system, see FEI-LING WANG, ORGANIZING THROUGH DIVISION AND EXCLUSION: CHINA'S HUKOU SYSTEM (2005). For more information on the early uses of *hukou* and its ties to employment, housing, education, and social security, see *Reform of China's Household Registration System Underway*, *supra* note 74.

⁷⁸ See Zhiqiang Liu, *Institution and Inequality: The Hukou System in China*, 33 J. COMP. ECON. 133, 137 (2005). Vice-Premier Zeng Peiyan revealed in a 2004 national conference that more than ¥360 billion (US\$43 billion) in unpaid wages remain owed to migrant workers at thousands of real estate projects. See Zeng: *Pay All Owed Wages to Migrants*, CHINA DAILY, Aug. 24, 2004, available at 2004 WLNR 11949200; see also, AM. CTR. FOR INT'L LABOR SOLIDARITY, JUSTICE FOR ALL: THE STRUGGLE FOR WORKER RIGHTS IN CHINA 39-40 (2004).

⁷⁹ See Pun Ngai, *Women Workers and Precarious Employment in Shenzhen Special Economic Zone*, China, 12 GENDER & DEV. 29, 30 (July 2004).

“social origin,” a topic discussed later in the section dealing with worker definitions under international covenants.⁸⁰

Gender also often blends with migrant worker discrimination in the workplace as female migrant workers (*dagong mei*) are often preferred to work in certain factory jobs.⁸¹ The connection has been described as follows.

More than 10 million migrant laborers work in Guangdong Province according to China's 2000 national census, and the Guangdong Statistical Bureau estimates that more than 60% of these are women. Migrant workers tend to staff wholly-foreign-owned enterprises, joint ventures, township and village enterprises, and private enterprises that produce toys, clothing, footwear, electronics, and other consumer goods. Female workers usually come to Guangdong from poorer provinces along the Yangzi River such as Hubei, Hunan, Jiangsu, Jiangxi, and Sichuan. They find jobs in Guangdong factories through labor bureaus, from relatives and friends, or by word of mouth. Guangdong's economy has grown more than 14% per year on average during the last decade, and the province has accounted for about half of the country's total GDP growth. Guangdong alone generates more than 40% of China's foreign trade in terms of value. While both the central and local governments have recognized the indispensable contribution of migrant labor, so far government policy [as of 2002] has provided migrant laborers few protections.⁸²

⁸⁰ It is argued that the use of “social origin” in ILO Convention No. 111 covers China's internal migrant workers. U.S. Dept. of Labor, *International Labor Standards: Discrimination and Equality*, available at <http://www.dol.gov/ilab/webmils/intllaborstandards/discrimination.html> (last visited Feb. 27, 2006) [hereinafter *International Labor Standards*]; see *infra* notes 163 and 164 under IIIA.2.b.

⁸¹ Zhang Ye et al., *Hope for China's Migrant Women Workers*, THE CHINA BUS. REV., May/June 2002, at 30, 31; see also Xiao-Yuan Dong et al., *Gender Segmentation at Work in China's Privatized Rural Industry: Some Evidence from Shandong and Jiangsu*, 32 WORLD DEV. 979, (2004). Pun Ngai, *supra* note 79, at 29.

⁸² Ye et al., *supra* note 81, at 31. New protections under the labor laws were issued by the central government in 2003 and 2004, discussed *infra* in IIIA.2.b.

This situation is confirmed by other sources:

In 2003, some 70% of the 5.5 million migrant workers in the Shenzhen special economic zone were women. In Shenzhen's industrial district of Nanshan, 80% of the half-million workers were women; their average age was 23.⁸³

Thus, the cheap cost of labor provided by migrant workers forms a very large segment of China's workforce, and seems to be a significant part of China's economic development during its economic transition. Whether migrant status should or will be designated as a protected class similar to gender, however, remains uncertain. But the continuing presence and growth of this "floating population" of migrant workers will certainly impact China's labor and social security laws significantly, especially in the areas of labor contracts, worker injuries, and unemployment.⁸⁴ If illegal employment discrimination is present because of the worker's migrant status, the remaining question is whether and how China's anti-discrimination laws will address it.

c. Race / Ethnicity

Though China has a relatively homogeneous population as 92 percent of its people are of the Han ethnicity, the remaining 8% includes over 100 million Chinese of fifty-five different ethnic minorities.⁸⁵ Therefore, "race" in China is often considered in the context of ethnicity. Defining "race" can be a complex undertaking in China, or any other

⁸³ AM. CTR. FOR INT'L LABOR SOLIDARITY, *supra* note 78, at 39 (original footnote omitted). See also Yuchao Zhu, *Workers, Unions and the State: Migrant Workers in China's Labour-intensive Foreign Enterprises*, 35 DEV. & CHANGE, 1011 (Nov. 2004).

⁸⁴ Ingrid Nielsen et. al., *Unemployment within China's Floating Population: Empirical evidence from Jiangsu Survey Data*, CHINESE ECON. (forthcoming 2006), manuscript available at <http://www.buseco.monash.edu.au/units/aberru/papers/unemployment-china-floating-population.pdf> (last visited July 4, 2005). In a recent report by the United Nations' Committee on Economic, Social and Cultural Rights reviewing China's report on its implementation of Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, the Committee, in its Concluding Observations, stated as one of its "Principles of Concern", "the de facto discrimination against internal migrants in the fields of employment, social security, health service, housing and education that indirectly result, *inter alia*, from the restrictive national household registration system (*hukou*) which continues to be in place despite official announcements regarding reforms;" and the Committee is "deeply concerned about the insufficient implementation of existing labour legislation in the State party that has resulted in generally poor conditions of work, including excessive working hours, lack of sufficient rest breaks and hazardous working conditions." U.N. *Concluding Observations*, *supra* note 57.

⁸⁵ U.N. Committee on the Elimination of Racial Discrimination, 59th Sess., *Ninth Periodic Reports Submitted by States Parties*, at 3, U.N. Doc. CERD/C/357 Add. 4 (Part I) (2001).

country. For example, the U.S. Supreme Court defined "race" under an 1800s civil rights law as being "genetically part of an ethnically and physiognomically distinctive subgrouping of homo sapiens."⁸⁶

The Chinese government in its report under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (agreed to since 1981) has defined "race" as "race, colour, descent, or national or ethnic origin."⁸⁷ According to the International Committee's comments, this report urges China to:

consider giving full effect to the provisions in the Convention in its domestic legal order and that it ensure the *penalization of racial discrimination*; and also, that it ensure access to effective protection and remedies through the competent national tribunals or other state institutions, against all acts of racial discrimination. It should be noted that the structural inadequacies in respect of anti-discrimination laws are in violation of Article 4 of ICERD.⁸⁸

This Report clearly calls for prohibitions on all acts of racial discrimination. It therefore promotes the elimination of any discrimination based on ethnicity, including that of national ethnic minorities.

While China must be credited with great success for the economic progress of regions with substantial racial minority populations, the ICERD Report makes the point "that economic development in minority regions does not ipso facto entail the equal enjoyment of economic, social, and cultural rights in accordance with Article 5(e) of the

⁸⁶ *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987). Justice Brennan, in a concurring opinion noted, "I write separately only to point out the line between discrimination based on 'ancestry or ethnic characteristics' and discrimination based on place of origin—the country 'where a person was born, or more broadly, the country from which his or her ancestors came.' [internal citations omitted] Often, the two are identical as a factual matter." *Id.* at 614. National origin discrimination then can include "place of origin, physical, culture or linguistic characteristics of that group." *Id.*

⁸⁷ International Convention on the Elimination of All Forms of Racial Discrimination, art.1, opened for signature Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [Hereinafter ICERD]; see also summary in *Ninth Periodic Reports Submitted by States Parties*, *supra* note 85, at 5-7.

⁸⁸ U.N. Committee on the Elimination of Racial Discrimination, 59th Sess., 1648th & 1649th mtg. at 3-5, U.N. Doc. CERD.C.59.Misc.16.Rev.3 (2001) [emphasis added].

Convention.”⁸⁹ Anecdotal information about hiring practices in China suggests that some employers continue to show racial prejudice against outsiders (those not of the local area), migrants, ethnic minorities, those speaking a different language, and those “looking different”.⁹⁰ Whether these purported instances of racial discrimination in employment reflect a pattern or are isolated instances is best left to further scientific inquiry. Of course, even if China were to enact and enforce a plethora of anti-discrimination laws, as has been done in the United State, such would not guarantee the eradication of racial discrimination.⁹¹

Ethnicity is another category of worker status, and can be closely associated with race, as discussed above.⁹² In China, the population of ethnic national minorities exceeds 106 million (about 8.4% of population), and it is argued that there continues to be job discrimination at the hands of the majority Han, particularly in border areas near the minority-dominated autonomous regions.⁹³ There have been anecdotal reports of preference for Hans over minorities for new construction jobs in Xinjiang, Inner Mongolia, and Tibet.⁹⁴ These reported incidents may merely reflect preference for education and technical skills, such as would be required in some of the new projects on oil and gas pipelines. In the mid-1990s, some reports by foreign advocates claimed discriminatory

⁸⁹ See *Report of the Committee on the Elimination of Racial Discrimination*, U.N. GAOR, 59th Sess., Supp. No. 18, at 48, U.N. Doc. A/56/18 (2001); see also Information Office of the State Council of the People's Republic of China (Beijing), Regional Autonomy for Ethnic Minorities in China, available at <http://www.china.org.cn/e-white/20050301> (last visited Feb. 27, 2006).

⁹⁰ In a reported case, a Hangzhou-based hotel refused to hire a job applicant, simply because the applicant spoke in a non-local dialect. See *Tongue-Tied Dialect*, *supra* note 2. Whether some or all of these categories may fall under “social origin” is discussed in III.2.b, *infra*.

⁹¹ HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, LEWIS AND NORMAN'S HORNBOOK ON EMPLOYMENT DISCRIMINATION LAW AND PRACTICE 215-25 (2d ed. 2004) [Hereinafter LEWIS & NORMAN]. During fiscal year 2004, The U.S. Equal Employment Opportunity Commission (EEOC) received 27,696 charges of race discrimination. The EEOC has observed an increasing number of color/race discrimination charges. Color/race bias filings have increased by 125% since the mid-1990s. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, RACE/COLOR DISCRIMINATION, <http://www.eeoc.gov/types/race.html> (last visited Feb. 27, 2006).

⁹² Merriam-Webster's Collegiate Dictionary defines ethnicity as particular affiliation of “large groups of people classed according to common racial, national, tribal, religious, linguistic, or cultural origin or background.” MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 326 (11th ed. 2003). The U.S. Supreme Court defined “race” as being “genetically part of an ethnically and physiognomically distinctive subgrouping of home sapiens.” *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 607 (1987).

⁹³ State Dept. Rpt., *supra* note 58. In a recent report by the United Nations' Committee on Economic, Social and Cultural Rights reviewing China's report on its implementation of Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, the Committee, in its Concluding Observations, stated as one of its “Principles of Concern”, “the reports regarding the discrimination of ethnic minorities in the State party, in particular in the field of employment, adequate standard of living, health, education and culture.” *U.N. Concluding Observation*, *supra* note 57, at 5.

⁹⁴ State Dept. Rpt., *supra* note 58.

treatment was occurring in Tibet as to wages and preference for proficiency in Mandarin, the national language, over the local language of Tibetan.⁹⁵ It is reported that in Hangzhou, the capital of Zhejiang Province, bus drivers and attendants must speak standard Mandarin (*Putonghua*) during working hours, and face employer-imposed fines if caught speaking local dialects.⁹⁶

In the United States, employment discrimination based on “physical, cultural, or linguistic characteristics of a national group” is prohibited by law where it is not shown to be a “bona fide occupational qualification” or “business necessity.”⁹⁷ Discrimination based on language has been categorized as both “race” and “national origin” discrimination, as there is often a clear connection between ethnicity and language.⁹⁸ Employer policies of speak-English-only still generate legal controversy.⁹⁹

d. Disability / Health

The term “disability” potentially includes many areas, including a person’s physical or mental limitations (such as blindness, deafness, etc.) or health status (such as having SARS, hepatitis B, or HIV/AIDS, injured workers, etc.).¹⁰⁰ Protecting against improper disability discrimination in the workplace is usually balanced against an employer’s desire to have an otherwise qualified worker. China has an estimated sixty million disabled people (about 5% of the population), with about 80% residing in rural

⁹⁵ It is reported that a minimum wage has been introduced everywhere in China except for the Tibet Autonomous Region. Tibetan Centre for Human Rights And Democracy, *1997 Annual Report: Human Rights Violations In Tibet* (on file with author). See also Osman Chuah, *Muslims in China: The Social and Economic Situation of the Hui Chinese*, 24 J. MUSLIM MINORITY AFF. 155, 155, (Apr. 2004).

⁹⁶ *Bus Personnel Must Speak Putonghua Or Else*, CHINA DAILY, June 4, 2005, http://www.chinadaily.com.cn/english/doc/2005-06/04/content_448499.htm.

⁹⁷ See 29 C.F.R. § 1606.1 (2005); 42 U.S.C. § 2000e-2(e)(i) (2005); 42 U.S.C. §§ 2000e-2(k)(1)(A)(i) (2005).

⁹⁸ *Hernandez v. N.Y.*, 500 U.S. 352, 364 (1991) (in the context of a community with substantial foreign-speaking ethnic population, classification based on language can purposeful discrimination against ethnicity).

⁹⁹ See *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993), cert. denied, 512 U.S. 1228 (1994); for general discussion, see AMERICAN CIVIL LIBERTIES UNION OF NORTH CALIFORNIA, LANGUAGE RIGHTS, <http://www.aclunc.org/language/lang-report.html> (last visited Feb. 27, 2006).

¹⁰⁰ BLACK’S LAW DICTIONARY 474 (8th ed. 2004).

areas.¹⁰¹ In 2000 it was estimated that 75% of disabled people had some type of employment.¹⁰² In 1990, China passed a law titled the Protection of Disabled Persons,¹⁰³ the primary emphasis of which was prohibiting discrimination in general,¹⁰⁴ and this law covers employment situations in prohibiting disability-based discrimination.¹⁰⁵

On the international level, while participating in a United Nations Working Group on the Convention on Rights of Persons with Disabilities, China proposed a draft "[aimed] at recognizing and protecting the rights of persons with disabilities," eliminating discrimination, and promoting equal opportunity.¹⁰⁶

Whether employment discrimination based on disability exists or is widespread in the Chinese workplace depends somewhat upon the legal interpretation of disability, discussed in greater detail in a later section. The number of Chinese workers screened out from equal employment opportunities by an appearances requirement ("five facial organs in the

¹⁰¹ CENTER FOR INTERNATIONAL REHABILITATION, PEOPLE'S REPUBLIC OF CHINA RIGHTS OF PEOPLE WITH DISABILITIES, available at <http://www.cimnetwork.org/idrm/reports/compendium/china.cfm> (last visited Feb. 27, 2006). In May, 2005 it was reported that of "China's 25 million disabled *job seekers* . . . 1 million live in urban areas with Beijing home to over half their number, according to China's Disabled Persons Federation (CDPF). The employment rate of the disabled in Beijing, those of working age and capable of employment, is around 85%." The Federation reported though many have jobs, "their general employment situation remains grave and they are facing increasing pressure and difficulty in finding a job." Liu Li & Wu Chong, *Nation to Create More Jobs for Disabled*, CHINA DAILY, May 16, 2005 at 2, available at http://www.chinadaily.com.cn/english/doc/2005-05/16/content_442328.htm.

¹⁰² Center for International Rehabilitation, *supra* note 101.

¹⁰³ 中华人民共和国残疾人保障法 [Law on the Protection of Disabled Persons] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 1990, effective May 15, 1991) 14 P.R.C. LAWS & REGS V-03-00-101, available at http://www.chinacourt.org/flwk/show1.php?file_id=11967 [hereinafter Law on Protection of Disabled Persons]. "Disability" is defined as "one who suffers from abnormalities or loss of a certain organ or function, psychologically, physiologically or in anatomical structure, and who has lost wholly or in part the ability to engage in activities in a normal way." *Id.* art. 2.

¹⁰⁴ Center for International Rehabilitation, *supra* note 101. In a recent report by the United Nations' Committee on Economic, Social and Cultural Rights reviewing China's report on its implementation of Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, the Committee, in its Concluding Observations, stated as one of its "Principles of Concern," the "reported persistence of discrimination against persons with physical and mental disabilities, especially in the fields of work, social security, education and health." *UN Concluding Observations*, *supra* note 57, at 3.

¹⁰⁵ Law on Protection of Disabled Persons provides that "[g]overnmental departments concerned shall, in determining the quota for employing and engaging workers and staff members, allot a certain proportion of the quota to disabled persons." Law on Protection of Disabled Persons, *supra* note 103, at art. 33.

¹⁰⁶ See Proposed Draft by China on U.N. Ad Hoc Committee Convention on Rights of Persons with Disabilities, §§ 1-3 (2003), art. 1, available at <http://www.un.org/esa/socdev/enable/rights/wgcontrib-china.htm> (last visited Feb. 27, 2006). The Convention, in Article 8, dealing with employment, recognizes the right to employment under equal conditions and "equal pay for equal work by eradicating any discriminatory regulations and practices that restrict or deny persons with disabilities in job-seeking, job retention and professional promotion." *Id.* art. 8.

right place”), mental or physical condition, or health consideration awaits further research and discovery by social scientists.¹⁰⁷

Worker health is another factor commonly scrutinized in the employment of workers and is closely associated with disabilities. Chinese employers have broad discretion in the selection of employees, and often screen out those whom they feel may be a problem, including those with certain health ailments such as hepatitis B and HIV/AIDS. The number of Chinese citizens afflicted by these two diseases number 120 million (approximately 10% of the population) and 840,000, respectively.¹⁰⁸

A survey conducted by Britain’s Synovate Healthcare reported that 52% of 425 hepatitis patients said they once lost a job or educational chance because of their disease; further, about 47% were concerned that employers would terminate them if the disease were discovered.¹⁰⁹ One Guangdong machinery and electronics company compelled 107 hepatitis B carriers to quit because of their condition.¹¹⁰

In April 2003, one university student in his senior year applied for a government position in Zhejiang Province and passed both the examination and the interview. However, he was rejected once the employer discovered he was a hepatitis B carrier. Distressed, the student, Zhou Yichao, retaliated by stabbing two officials, killing one. Zhou was later tried and sentenced to death.¹¹¹ His case aroused public attention and stirred national pressure for protective legislation.¹¹²

Another student who was also rejected for a government job after testing positive for hepatitis B chose to file a law suit against the government, challenging the rejection.¹¹³ The People’s Court in Xinwu District of Wuhu City in Anhui Province accepted the case, China’s first hepatitis B discrimination case. In April, 2004 the court ruled in the

¹⁰⁷ Examples of anecdotal incidents of disability discrimination reported in newspaper accounts include disfigurement on a hand, “ugly appearance,” and being too short by 5 millimeters. See Shang Shui, *supra* note 2.

¹⁰⁸ Statistics Released by Ministry of Health (May 1, 2005) (on file with author); YE JINGYI & WEI QIAN, LEGAL PROBLEMS CONCERNING HEALTH DISCRIMINATION IN EMPLOYMENT, <http://www.humanrights.cn/zt/magazine/200402004921170301.htm> (last visited Feb. 27, 2006); see also Liang Chao, *supra* note 10.

¹⁰⁹ *Hep B Carriers Allowed to Join Public Service*, CHINA DAILY, Jan. 21, 2005, http://www.chinadaily.com.cn/english/doc/2005-01/21/content_411013.htm.

¹¹⁰ *Dispute Arises*, *supra* note 2.

¹¹¹ See Liang Chao, *supra* note 10.

¹¹² 曹林, 周一超悲剧的肝炎歧视成本 [Cao Lin, *See the Cost of Discrimination against HBV Carriers from the Zhou Yichao Murder Case*], 新闻周刊 [CHINA NEWS WK.], Sep. 15, 2003, at 8, available at <http://www.chinanewsweek.com.cn/2003-09-22/1/2262.html>; See also Ye & Wei, *supra* note 108.

¹¹³ See Liang Chao, *supra* note 10.

student's favor upon a finding of improper discrimination.¹¹⁴ However, the court did not order the government to provide a job for the student.¹¹⁵

Some local governments, including the government of Hunan Province in central China, have reportedly dropped bans on hiring Hepatitis B carriers, perhaps in anticipation of new legislation regulating disability and health qualifications for jobs in government service.¹¹⁶ However, as late as 2004, health/disability requirements for government jobs seemed to persist. For example, in Guangdong any applicant who manifests listed diseases or physiological deficiencies is deemed to be unqualified for a position in the Guangdong public service. A partial list includes, an obvious squint (*xie shi*), cleft lip, torticollis (wry neck), pigmentation moles, curvature of the spine, certain incomplete fingers, vision tests lower than 4.9, hearing deficiencies, stuttering, a history of enuresis (bed-wetting), signs of heart disease, hypertension, bronchiectasis, diabetes, hepatitis, too many fillings in their teeth, or lower jaw arthritis.¹¹⁷ Certain tests are available to allow an applicant to show that his or her past history of disease is fully under control.¹¹⁸ This list may need to be revisited after a review of China's recent laws and regulations.¹¹⁹

e. Religious Belief

While discrimination based on religious beliefs is expressly prohibited by the Labor Law, there are also other laws pertaining to religion and religious discrimination that could, on a limited basis, be

¹¹⁴ *Court Confirms Right of Hepatitis B Carrier*, CHINA DAILY, Apr. 3, 2004, http://www.chinadaily.com.cn/english/doc/2004-04/02/content_320351.htm; *Government Loses Hep. B Discrimination Case*, SHENZHEN DAILY, June 1, 2004, at 4.

¹¹⁵ Liang Chao, *supra* note 10.

¹¹⁶ *Hep B Carriers Allowed to Join Public Service*, *supra* note 109.

¹¹⁷ 广东省国家公务员录用体检实施细则(试行) [Regulations of Guangdong Province for Physical Examination on Hiring Public Servants (provisional)] art. 11 (Apr. 29, 2002), available at <http://www.rsj.sz.gov.cn/gzdt/200511/t8107.htm> [hereinafter Guangdong Regulations].

¹¹⁸ *Id.* art. 12.

¹¹⁹ 中华人民共和国传染病防治法 [Law on Prevention and Treatment of Contagious Disease] (promulgated by the Standing Comm. of the Nat'l People's Cong., Feb. 21, 1989, effective Sept. 1, 1989, amended Aug. 28, 2004) (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=96086 [hereinafter Contagious Disease Law]; 公务员录用体检通用标准(试行) [Health Qualifications for Hiring Civil Servants (provisional)] (promulgated by the Ministries of Health and the Ministry of Personnel, Jan. 17, 2005) (P.R.C.), available at <http://www.dffy.com/faguixiazai/xzf/200501/20050123163654.htm> [hereinafter Health Qualifications for Hiring Civil Servants].

used to limit employment discrimination.¹²⁰ However, there seems to be a paucity of reported incidents involving employment discrimination under any of the laws relating to religious belief.

f. Other Categories: Age and Height

i. Age

In China, there are reported to be many job advertisements requiring applicants to be, for example, "below 35-years old."¹²¹ Though old age is generally revered in China, ads like this underscore the attitudes of many employers who hold stereotypes about the abilities of older people to work. But as the average age in China rises and as labor shortages appear from time to time, some employers have turned to employing "older" workers with satisfactory results.¹²²

The age of retirement in China for some years has been set at fifty for female workers, fifty-five for female cadres, and sixty for male workers and cadres.¹²³ Such policies may need to be adjusted in view of the increasing age of the population and the demands placed on pensions during long years of retirement.¹²⁴ It seems the government must chose

¹²⁰ Any public official interfering with the exercise of protected religious activities will face criminal penalties. 中华人民共和国刑法 [Criminal Law] art. 251 (promulgated by the Standing Comm. of the Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997, revised Feb. 28, 2005) 03/1997 全国人民代表大会常务委员会公报 [STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.] 138 (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=27762 [hereinafter Criminal Law]. Local government has the obligation to protect the religious freedom in ethnic minority regions. 中华人民共和国民族区域自治法 [Law on Regional National Autonomy] art. 11 (promulgated by the Standing Comm. of the Nat'l People's Cong., May 31, 1984, effective Oct. 1, 1984, revised Feb. 28, 2001) (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=36850 [hereinafter Law on Regional National Autonomy].

¹²¹ 白天亮, 招聘有歧视, 依法促公平 [Bai Tianliang, *Discrimination Exists in Hiring Process; Equality To Be Achieved Through Law*], 人民日报 [PEOPLES' DAILY], Feb 11, 2003, at E1, available at <http://past.people.com.cn/GB/shenghuo/78/116/20030211/920873.html>.

¹²² Dali L. Yang, *China's Looming Labor Shortage*, 168 FAR E. ECON. REV. 19, 20 (2005).

¹²³ See 劳动和社会保障部办公厅关于企业职工"法定退休年龄"涵义的复函 [Reply by the Ministry of Labor and Social Security on the Meaning of "Legal Retirement Age" of the Workers in State-Owned Enterprises] (May 11, 2001), http://www.chinacourt.org/flwk/show1.php?file_id=37327 [hereinafter Reply on Legal Retirement Age]; certain female teachers, doctors, and scientific and technical personnel can retire at age sixty, but men in the same positions may work until age sixty-five. Christine M. Bulger, Note, *Fighting Gender Discrimination in the Chinese Workplace*, 20 B.C. THIRD WORLD L.J. 345, 358 (2000). Labor Law states that employees can enjoy social security benefits only after legal retirement. Labor Law, *supra* note 19, at art. 73(1).

¹²⁴ This issue will continue to grow as the rapidly aging population in China of persons aged sixty-five and over will have grown in 2000 to 2007 from 100 million to 200 million (which will constitute 14% of China's total population) increasing more than 14 million per year. Fu Jing, *Huge Sum to Be Put Into Social Security*, CHINA DAILY, Sep. 18, 2004, http://www.chinadaily.com.cn/english/doc/2004-09/18/content_375540.htm.

between eliminating this form of employment discrimination, or paying enormous amounts in unemployment and pension insurance.

ii. Height

Though the Constitutions of both the United States and China provide that all citizens are equal,¹²⁵ neither country's anti-discrimination labor legislation explicitly identify height as a protected status in the same way that other characteristics such as race and gender are. Interestingly, history teaches that short people can become great leaders of countries as well as companies.¹²⁶

In the United States, the anti-discrimination laws do not protect height itself, but do so indirectly through other protected statuses, such as gender or national origin.¹²⁷ An employer's use of non-job-related height requirements for job applicants (e.g., prison guards) which disproportionately disqualified large numbers of potential women and applicants of Asian descent was held to be in violation of the law.¹²⁸ Despite finding no discriminatory intent to the policy, the court ruled its indirect effect ("disparate impact") of denying jobs to many qualified persons violated anti-discrimination protections.

While height limitations are often spelled out in government job qualifications in China,¹²⁹ they are less likely to be found in the job requirements of private employers. Government limitations on height may often be found in the physical requirements for government positions. For example, in the Physical Examination Regulations for Hiring Public Servants in Guangdong Province, Clause 11 of Article 12 states, "[M]en must be above 1.6 meters [five feet, three inches] and forty-eight kilograms [105.8 pounds]; females must be above 1.5 meters [four feet, eleven inches] and forty-two kilograms [92.59 pounds]"; whereas, Article 14 says, "police must be taller and have better eyesight."¹³⁰ Such height restrictions may well eliminate women and certain ethnic groups from the applicant pool without consideration of their merits.

¹²⁵ U.S. CONST. amend. XIV, § 1; 宪法 [CONST.] art. 33 (2004) (P.R.C.).

¹²⁶ For example, Deng Xiaoping's height was 4 feet 11 inches and the shortest U.S. President, James Madison, was 5 feet 4 inches. See Dan Harbord, Famous People Height List, <http://members.shaw.ca/harbord/heights3.html> (last visited Feb. 27, 2006). For an essay on being short, see Jonathan Rauch, *Short Guys Finish Last*, ECONOMIST, Dec. 23, 1995, at 19.

¹²⁷ 16B AM. JUR. 2D *Constitutional Law* §§ 808-17; and see, statutory interpretation of Title VII dealing with height in *Dothard v. Rawlinson* 433 U.S. 321 (1977).

¹²⁸ *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

¹²⁹ Guangdong Regulations, *supra* note 117. See also Joseph Kahn, *Chinese People's Republic Is Unfair to Its Short People*, N. Y. TIMES, May 21, 2004, at A13.

¹³⁰ Guangdong Regulations, *supra* note 117.

III. CHINA'S ANTI-DISCRIMINATION LAWS

A. Laws Providing "Protected Status"

At the end of 2004, China reported having 752 million people in its workforce, including 264.8 million urban workers.¹³¹ Among that group, 45.5% were women, of whom 97.3 million were employed as urban workers.¹³² Among the 100-150 million migrant workers, approximately 70% were reportedly in the urban workforce.¹³³ However, the number of urban workers with disabilities, hepatitis B or HIV/AIDS is uncertain.¹³⁴

1. The 1994 Labor Law

a. Race, Ethnicity, Sex, and Religious Belief

Applicable current legislation prohibiting employment discrimination comes from various sources, not just labor laws.¹³⁵ Article 12 of the 1994 Labor Law states that "laborers, regardless of their ethnic groups, race, sex, or religious belief, shall not be discriminated against in employment."¹³⁶ However, Article 14 exempts "people of minority ethnic groups," along with the disabled and demobilized army men where "special stipulations in laws, rules and regulations" apply.¹³⁷

Race does not appear to be a much-used category in employment discrimination, except to the degree it is intertwined with ethnicity or one of its indirect manifestations such as language, dress, or customs. The

¹³¹ 劳动及社会保障部, 国家统计局, 2004 年度劳动和社会保障事业发展统计 [MINISTRY OF LABOR AND SOCIAL SECURITY & NATIONAL BUREAU OF STATISTICS, 2004 STATISTICS ON THE LABOR AND SOCIAL SECURITY ACHIEVEMENTS] (Feb. 1, 2005) [hereinafter 2004 STATISTICS] (on file with author).

¹³² INFORMATION OFFICE OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, PROGRESS IN CHINA'S HUMAN RIGHTS CAUSE IN 2003, http://news.xinhuanet.com/zhengfu/2004-04/01/content_1396172.htm (last visited Feb. 28, 2006).

¹³³ *China's Floating Population Exceeded 10% of Total Population*, *supra* note 9. Kenneth Roberts, *Female Labor Migrants to Shanghai: Temporary "Floaters" or Potential Settlers?*, 36 INT'L MIGRATION REV. 492, 496 (2002).

¹³⁴ Daniel Goodkind & Loraine A. West, *China's Floating Population: Definitions, Data and Recent Findings*, 39 URB. STUD. 2237, 2238 (2002); *see also* Center for International Rehabilitation, *supra* note 101.

¹³⁵ For example, special legislations on women's rights partially override the application of workplace anti-discrimination laws. 中华人民共和国妇女权益保障法 [Law on Protection of Women's Rights and Interests] arts. 23-27 (promulgated by the Standing Comm. of the Nat'l People's Cong., Apr. 3, 1992, effective Oct. 1, 1992, revised Aug. 28, 2005) (P.R.C.), *available at* http://www.chinacourt.org/flwk/show1.php?file_id=14697 [hereinafter Women's Rights Law].

¹³⁶ Labor Law, *supra* note 19, at art. 12.

¹³⁷ *Id.* art. 14.

question concerning ethnicity is whether or not it is exempted by Article 14 of the Labor Law (discussed below), leaving race as a protected status vacant of use, except perhaps as it overlaps with ethnicity and as it is applied to either foreigners or Chinese citizens of non-Chinese descent.¹³⁸

Gender is a protected status under Article 12 of the Labor Law and several other laws. Women are also covered by Article 13 of the Labor Law, which provides,

[W]omen shall enjoy the equal employment right with men. With exception of the special types of work or posts unsuitable to women as prescribed by the State [Articles 59-63], no unit may, in employing staff and workers, refuse to employ women by reason of sex or raise the employment standards for women.¹³⁹

The “unsuitable work” exceptions apply to work in mine pits,¹⁴⁰ work on high ground, low temperatures, in cold water, in Grade III physical labor during a woman’s menstrual cycle,¹⁴¹ work during pregnancy,¹⁴² and provide entitlement to maternity leave for child birth.¹⁴³ The exceptions further limit work during periods of breast-feeding for children less than one-year old.¹⁴⁴

Religious belief is another protected status insulated against employment discrimination under the Labor Law.¹⁴⁵ As in many

¹³⁸ A person can obtain Chinese citizenship by blood or by birth. The law says “When the parents, who have no nationality or whose nationality is uncertain, reside in China, and the child was born in China, then the child automatically obtains Chinese citizenship.” 中华人民共和国国籍法 [Nationality Law] art. 6 (promulgated by the Standing Comm. of the Nat’l People’s Cong., Sept. 10, 1980, effective Sept. 10, 1980) (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=1543.

It was a dead provision for years because it was extremely difficult to get permanent residence in China. However, as of recent China allows a foreigner and his/her spouse to become permanent residents, if, among other conditions, the foreigner invests at least US \$ 500,000. 外国人在中国永久居留审批管理办法 [Provisions For the Administration of Examination and Approval of Foreigners’ Permanent Residence in China] art. 7 (promulgated by the St. Council, Ministry of Foreign Affairs, and Ministry of Pub. Sec., Aug. 15, 2004, effective Aug. 15, 2004) (P.R.C.), available at <http://www.bjgb.gov.cn/data/news/fgtl/2004830113528.htm>. Other ways to obtain Chinese permanent residence include employment and teaching. *Id.* art. 8.

¹³⁹ See Labor Law, *supra* note 19, at art. 13.

¹⁴⁰ *Id.* art. 59

¹⁴¹ *Id.* art. 60

¹⁴² *Id.* art. 61

¹⁴³ *Id.* art. 62.

¹⁴⁴ *Id.* art. 63

¹⁴⁵ *Id.* art. 12.

countries, religious beliefs are often intertwined with other protected statuses, such as ethnic background and race.¹⁴⁶

b. “Exemption” for Ethnic Minorities

Article 14 of the Labor Law exempts ethnic minorities and the disabled from coverage where “special stipulations” that otherwise provide protection exist. If special stipulations for the disabled and people of minority ethnic groups do exist, ethnic minorities would be exempted from the coverage and protection of the Labor Law per Article 14. The exemption for the disabled, however, appears meaningless since disability was not covered by Article 12 in the first instance.¹⁴⁷

As to the possible Article 14 exemption of “people of minority ethnic groups,” some laws protect national ethnic minorities¹⁴⁸ but do not include a specific prohibition on employment discrimination.¹⁴⁹ Therefore, in the author’s judgment, it would seem that this group would not be exempted from coverage under the Labor Law.

Pursuant to international conventions, China has agreed to treat the issues of welfare and employment discrimination against ethnic groups under the category of “race.”¹⁵⁰ Therefore, there appears to be a dual legislative avenue of relief for those claiming employment discrimination based on ethnic minority status through either “race” or

¹⁴⁶ Under U.S. discrimination law, language, accents, and customs can be categorized as race, religion, or national origin. See LEWIS & NORMAN, *supra* note 91, at 45-48.

¹⁴⁷ “[S]pecial stipulations in laws, rules and regulations” do exist for the “disabled” and therefore, at any rate, those laws control discrimination against disabled workers. The 1990 Law on the Protection of Disabled Persons prohibits discrimination, in society generally, against the disabled. Law on Protection of Disabled Persons, *supra* note 102, at art. 3. It also specifically bans discrimination in job “recruitment, employment, obtainment of permanent status, promotion” and other areas discussed more fully in a subsequent section. *Id.* art. 34. See also 安徽省按比例安排残疾人就业办法 [Regulations of Anhui Province on Arranging Employment for the Disabled Persons According to Employment Quota], art. 7 (promulgated by the People’s Government of Anhui Province, May 30, 2004, effective July 1, 2004) (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=95143.

¹⁴⁸ For example, Law on Regional National Autonomy prohibits discrimination against minority ethnic groups. Law on Regional National Autonomy, *supra* note 120, at art. 9; 中华人民共和国工会法 [Trade Union Law] art. 3 (promulgated by the Standing Comm. of the Nat’l People’s Cong., Apr. 3, 1992, effective Apr. 3, 1992, revised Oct. 27, 2001) (P.R.C.), available at <http://people.com.cn/GB/shizheng/8198/29614/29642/2071559.html> (prohibiting racial discrimination on Union benefits). See also the Law on Regional National Autonomy, *supra* note 120, at art. 23 (requiring enterprises in national autonomous areas to give priority to minority groups when recruiting personnel).

¹⁴⁹ See Labor Law, *supra* note 19, at art. 14. In the author’s judgment, the Labor Law defers to other regulations on ethnic minority employment issues, only if there are job discrimination provisions that would include the full employment status.

¹⁵⁰ ICERD, *supra* note 87, at art. 14.

“ethnic minority” status. In China, it is difficult to discuss race (except as to “foreigners”) as apart from ethnicity.

2. Other Anti-Discrimination Laws

In addition to China's Labor Law, there are other sources of anti-discrimination laws in the employment context that cover gender, migrant worker status, ethnic minority status, disability/health conditions, and religious beliefs.¹⁵¹

a. Gender

China faces major challenges in achieving gender equity. The World Bank issued a report describing those challenges as follows:

As in many other countries, China is having some difficulty monitoring and enforcing its own Labor Law, especially in the private sector—let alone the informal sector. State affirmative action policies have receded while traditional gender stereotypes and values have re-emerged, including gender discrimination in the labor market. Women are often employed in lower status, lower paid jobs. During the transition, women have had a harder time than men obtaining and keeping jobs Women appear to be disproportionately represented among laid-off workers, suffer from a higher unemployment rate and have greater difficulty finding alternate employment.¹⁵²

China's Constitution guarantees women equal rights with men, protects the rights and interests of women, and provides that there shall be equal pay for equal work.¹⁵³ However, China's Constitution is non-self-executing, or in other words, it is aspirational and cannot by itself be

¹⁵¹ For example, any public official interfering with exercise of protected religion activities will face criminal penalties. Criminal Law, *supra* note 120, at art. 251. See also 国务院办公厅关于进一步做好改善农民进城就业环境的通知 [NOTICE FROM THE STATE COUNCIL ON FURTHER IMPROVING WORKING CONDITIONS FOR MIGRANT WORKERS] (Dec, 27, 2004), available at http://www.gov.cn/zwggk/2005-08/15/content_23262.htm [hereinafter Notice on Improving Working Conditions for Migrant Workers].

¹⁵² E. ASIA ENV'T & SOC. DEV. UNIT, WORLD BANK, CHINA COUNTRY GENDER REVIEW 14-18 (2002), available at http://info.worldbank.org/etools/library/view_p.asp?152361 (last visited Feb. 27, 2006) [hereinafter CHINA COUNTRY GENDER REVIEW].

¹⁵³ 宪法 [CONST.] art. 48 (2004) (P.R.C.); see also Bulger, *supra* note 123, at 352.

enforced in Chinese courts; constitutional doctrines must be incorporated into laws promulgated by the government.¹⁵⁴

Other possible sources of government obligation to protect against gender discrimination in the workplace are international agreements. China has ratified the United Nation's Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and submitted reports on its progress under this Convention.¹⁵⁵ China also has ratified the International Covenant on Economic, Social, and Cultural Rights (ICESCR), which obligates the government to work toward the elimination of discrimination against women in a variety of areas, including employment.¹⁵⁶

Other international commitments undertaken by China include its ratification of ILO Convention No. 100 concerning equal pay for equal work.¹⁵⁷ However, it has not yet ratified ILO Convention 111, which bans discrimination based on race, color, sex, religion, political opinion, national extraction, and social origin.¹⁵⁸

Domestically, China's Law on Protection of Women's Rights and Interests (hereinafter "Women's Rights Law") provides legal prohibitions against employment discrimination based on gender.¹⁵⁹ Under this law, women and men enjoy equal employment rights.¹⁶⁰ The law prohibits any hiring discrimination against women, and, unless the job position is unsuitable for females, the hiring standard for men and women must be the same.¹⁶¹ For promotions as well, under the equality principle men and women are to be treated equally.¹⁶² Likewise, women and men shall be

¹⁵⁴ 宪法 [CONST.] arts. 58, 62(2), 89(1) (2004) (P.R.C.).

¹⁵⁵ United Nations Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (1980) (States Parties agree to take all appropriate measures, including legislation, to ensure full development and advancement of women in political, social, economic, and cultural fields, in order to guarantee them the exercise and enjoyment of human rights and fundamental freedoms on basis equal to that of men) [hereinafter CEDAW]. For China's periodic reports, see U.N. Committee on the Elimination of Discrimination against Women, 20th Sess., *Third and Fourth Periodic Reports of States Parties*, at 1-27, U.N.Doc.CEDAW/C/CHN/3-4 (1997); U.N. Committee on the Elimination of Discrimination against Women, *Combined Fifth and Sixth Periodic Reports of States Parties* at 1-129, U.N.Doc.CEDAW/C/CHN/5-6/Add.1 (2004).

¹⁵⁶ U.N. Committee on Economic, Social and Cultural Rights, 33d Sess., *Initial Reported Submitted by the People's Republic of China* at 1-128, U.N. Doc. E/1990/5/Add.59 (2003).

¹⁵⁷ International Labour Organization Convention (No. 100) Concerns Equal Remuneration for Men and Women Workers for Work of Equal Value, June 29, 1951 165 U.N.T.S. 32.

¹⁵⁸ International Labour Organization Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31.

¹⁵⁹ Women's Rights Law, *supra* note 135, at arts. 23-27.

¹⁶⁰ *Id.* art. 22. It appears therefore, that in most situations, the ban on gender discrimination is equally available to male victims.

¹⁶¹ *Id.* art. 23.

¹⁶² *Id.* art. 25.

paid the same rate when they are working on the same job,¹⁶³ and the employer may not terminate any female employee on the grounds of marriage, pregnancy, maternity leave, or nursing.¹⁶⁴

Currently in China, the law fixes different retirement ages for men and women.¹⁶⁵ As a result, women receive substantially smaller pensions than men do, even though other employee benefits are equal. Correspondingly, men are discriminated against by not having the same early retirement age as women. Though this difference is based on gender and is thus perhaps in conflict with China's Constitution, it does not appear to violate any employment discrimination laws, and is in fact authorized by law. Interestingly, a gender discrimination case was recently reported in Jinjiang District Court in Chengdu, Sichuan, where the court held an employer illegally discriminated against women workers when it did not provide them the same retirement options as men.¹⁶⁶

A newly-emerging right for women is protection against sexual harassment in the workplace. Though as of yet there is no clear legal definition of this right, it is based upon gender discrimination and is still being developed in court litigation. Such a right would arguably fall under either or both of the Labor Law and the Women's Rights Law.¹⁶⁷ The All China Women's Federation had recommended an amendment to the Women's Rights Law to explicitly prohibit sexual harassment and require employers to take measures to prevent it. The NPC Standing

¹⁶³ *Id.* art. 24.

¹⁶⁴ *Id.* art. 27.

¹⁶⁵ The retirement age is 60 for men, 50 for female workers, and 55 for women cadres. See Reply on Legal Retirement Age, *supra* note 123. See also Bulger, *supra* note 123, at 358. See generally the Ninth Women's National Congress, <http://www.cctv.com/lm/124/41/90118.html> (last visited Mar. 31, 2006).

¹⁶⁶ Huang Zhiling, *Women Win Sexual Discrimination Case*, CHINA DAILY, June 20, 2005, at 3, available at http://www.chinadaily.com.cn/english/doc/2005-06/20/content_452706.htm. The seven women plaintiffs' case had been denied by the Chengdu Municipal Labor Arbitration Committee before they brought the suit to the court. The legal basis of the claim is gender, but it is unclear whether the court's finding was based on the Labor Law, the Women's Rights Law, the Constitution, or some other basis. Article 27 of the new amendments to the Women's Rights Law states "(a)ny unit shall not discriminate against women by reason of gender when implementing the national retirement system." This amendment became effective December 1, 2005. See Women's Rights Law, *supra* note 135, at art. 27.

¹⁶⁷ Women's Rights Law, *supra* note 135, at arts. 40, 58; Labor Law, *supra* note 19, at arts. 12, 13.

Committee on August 28, 2005 passed the amendment outlawing the former, but it did not go so far as to require the latter.¹⁶⁸

The most common forms of sexual harassment are reported to be body touching and verbal harassment, as well as emails and cell phone text messages.¹⁶⁹ Though there have been only a few court cases, plaintiffs have prevailed in at least two instances. In Beijing, a male employee was awarded ¥2000 (US\$242) for harassment by a middle-aged woman who would not stop seeking his sexual favors.¹⁷⁰ In a second successful lawsuit, a female teacher in Wuhan proved her superior had sexually harassed her.¹⁷¹ The court verdict provided only for a public apology and denied her request of ¥2000 (US\$242) compensation for psychological suffering because, as the court determined, "the harassment did not have any serious effect on the accuser."¹⁷² In other cases, plaintiffs have been denied relief due to insufficient evidence.¹⁷³

¹⁶⁸ Zhongpeng Zhao, *Legislative Recommendation by the All China Women's Federation Puts Forth Concept of "Sexual Harassment" for the First Time*, BEIJING MORNING DAILY, Mar. 4, 2005, <http://www.chinalawdigest.com/article.php?aid=123> (accessible by free registration).

[T]he changes proposed by the ACWF include stopping discrimination against women in the workplace. For the first time in China, the very concept of sexual harassment will enter the national legal system. The proposed amendment requires all employers to try to stop harassment at work. And there will also be new clauses that insist on gender equality in retirement terms. Once the ACWF's definition is accepted by the NPC, sexual harassment is likely to be made a criminal offence.

The Yin and Yang of a Harmonious Society, CHINA DAILY, Mar. 8, 2005, http://english.people.com.cn/200503/08/eng20050308_176060.html.

The NPC standing committee declined to include the clauses imposing mandatory duties on employers to prevent sexual harassment in work places, on the grounds that it could not formulate a national standard of such duty and such duty would rather limit the effort of anti-harassment to narrowly defined workplace settings. 新妇女权益保障法: 我国法律首次对性骚扰说不 [*A New Law on Protection of Women's Rights and Interests: Law Says No to Sexual Harassment for the First Time*], 新华网 [XINHUA NEWS AGENCY], Aug. 28, 2005, http://news.xinhuanet.com/legal/2005-08/28/content_3414548.htm; see also 全国人大常委会关于修改中华人民共和国妇女权益保障法的决定 [Decision of the Standing Committee of the National People's Congress about Amending the Law on Protection of Women's Rights and Interests] (promulgated by Standing Comm. of the Nat'l People's Cong., Aug. 28, 2005, effective Dec. 1, 2005) (P.R.C.), available at http://www.legaldaily.com.cn/misc/2005-11/08/content_216846.htm.

¹⁶⁹ Zhao, *supra* note 168.

¹⁷⁰ *Manager Wins Harassment Case*, CHINA DAILY, Sept. 18, 2003, http://www.chinadaily.com.cn/en/doc/2003-09/18/content_265337.htm.

¹⁷¹ Judgment was granted on Nov. 6, 2003. See *City's 1st Sex Harassment Case Heard*, PEOPLE'S DAILY, Nov. 7, 2003, http://english.people.com.cn/200311/07/eng20031107_127778.shtml. China Daily has reported the lawsuit. See *In Brief*, CHINA DAILY, Oct. 30, 2003, at 3, and *Stalemate in Sex Lawsuit*, CHINA DAILY, June 1, 2003, available at http://www1.chinadaily.com.cn/en/doc/2003-07/01/content_242114.htm.

¹⁷² *In Brief*, *supra* note 171.

¹⁷³ *Id.*

b. Migrant Workers

Discrimination based on "social origin," as would seem to be the proper classification of biases against Chinese migrant workers, is recognized by the United Nation's Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR), both of which China has ratified.¹⁷⁴ Additionally, ILO Convention 111, which China has not ratified, eliminates all forms of discrimination, including "social origin."¹⁷⁵ However, since Convention 111 is a "core labor standard," nations are thought to be bound to the principle of providing equal employment opportunity, including the prevention of discrimination due to "social origin."¹⁷⁶

Impediments to equal employment opportunities for migrant workers exist in China's historic use of the *hukou* system, which restricts the ability of migrating workers to obtain residential status, as well as their eligibility for social insurance and social benefits in geographic

¹⁷⁴ Universal Declaration of Human Rights, art. 2, G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948), International Covenant on Civil and Political Rights, art. 2, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. China ratified ICCPR on Oct. 5, 1998. See also Constance Thomas & Yuki Horii, FUNDAMENTAL RIGHTS AT WORK AND INTERNATIONAL LABOUR STANDARDS 62 (2003) ("Social origin" is frequently used in major international human rights treaties without a precise definition in the treaties themselves). The ILO in its Convention No. 111 uses "social origin" as a status protected against employment discrimination. International Labour Organization Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31. "Social origin" has been defined as "[t]his criterion refers to situations in which an individual's membership of a class, socio-occupational category or caste determines his or her occupational future, either because he or she is denied access to certain jobs or activities, or because he or she is only assigned certain jobs. Even in societies with considerable social mobility, a number of obstacles continue to prevent perfect equality of opportunity for the various social categories." *Id.* at art. 1.

¹⁷⁵ International Labour Organization Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31. In a document prepared by an ILO Committee of Experts, "[c]ertain principles relating to the application of the Conventions, which are not explicitly set out in the instruments" but have been "developed in the comments of the Committee of Experts." Thomas & Horii, *supra* note 174, at 72. Regarding "social origin," the Experts commented, "[p]rejudices and preferences based on social origin may persist when a rigid division of society into classes determines an individual's opportunities in employment and occupation, or when certain 'castes' are considered to be inferior and are therefore confined to the most menial jobs." *Id.* at 73. Moreover, the U.S. Department of Labor in a report on international labor standards, noted that "in response to concerns that *internal* migrant workers in China are not covered by Convention 111, an ILO official noted that they are considered to be covered by the prohibition on discrimination on the basis of social origin." *International Labor Standards*, *supra* note 80.

¹⁷⁶ Harry Arthurs, *Reinventing Labor Law for the Global Economy*, 22 BERKELEY J. EMP. & LAB. L. 271, 294 n.46 (2001).

areas other than that of their original employment.¹⁷⁷ Notwithstanding these residential restrictions, some changes, both legal and de facto, are taking place. For example, in response to wide-spread reports of labor exploitation, discrimination and abuse by employers of migrant workers,¹⁷⁸ China's central government has issued new regulations to protect the labor rights of migrant workers. In December 2004, the State Council issued its Notice on Migrant Worker's Employment.¹⁷⁹ It provides that migrant workers enjoy all of the rights provided by the Labor Law,¹⁸⁰ and that for hiring purposes they must be treated equally with urban residents.¹⁸¹ The State Council also sought to stop local government use of administration detention against migrant workers,

¹⁷⁷ For detailed description of the history, development, functions, impact and operational mechanisms of China's hukou system, see generally FEI-LING WANG, *supra* note 77. For a brief summary, see CANADA IMMIGRATION AND REFUGEE BOARD, CHINA: REFORMS OF THE HOUSEHOLD REGISTRATION SYSTEM (HUKOU) (1998-2004), http://www.irb-cisr.gc.ca/en/research/publications/index_e.htm?docid=279&cid=50 (last visited Feb. 27, 2006); *People on the Move, Old Residence Registration System in Being Unified*, BEIJING REV., Jan. 1, 2004, at 32.

¹⁷⁸ *Let's Protect Migrant Workers*, CHINA DAILY, Apr. 4, 2005, http://news.xinhuanet.com/english/2005-04/04/content_2783301.htm; *Ensure Equal Payment*, CHINA DAILY, Mar. 29, 2005, http://www.chinadaily.com.cn/english/doc/2005-03/29/content_428901.htm; *City Job Hurdles Cleared for Migrants*, CHINA DAILY, Feb. 21, 2005, http://www.chinadaily.com.cn/english/doc/2005-02/21/content_417890.htm. John Knight & Linda Yueh, *Job Mobility of Residents and Migrants in Urban China*, 32(4) J. COMP. ECON. 637, 642 (2004).

A legal notice provides that migrant workers have equal rights to participate in worker's compensation. See 关于农民工参加工伤保险有关的通知 [Notice on Migrant Workers' Right to Work-related Social Insurance] (promulgated by the Ministry of Labor & Soc. Sec., June 1, 2004) (P.R.C.), available at http://news.xinhuanet.com/zhengfu/2004-06/18/content_1533078.htm. In 2003, the State Council issued a legal opinion on migrant labor which added that the government shall eliminate all the discriminatory, restrictive regulations aimed at migrant labor. See 关于做好农民进城务工就业管理和服务工作的通知 [Notice on Managing and Servicing Migrant Workers] (promulgated by the General Office of the State Council, Jan. 5, 2003, effective Jan. 5, 2003) (P.R.C.), available at <http://www.molss.gov.cn/correlate/gbf200301.htm>. The Agriculture Law standardizes procedures for recruiting rural laborers. This provides additional assistance to migrant workers, though not necessarily protecting against job discrimination. See 中华人民共和国农业法 [Agriculture Law] art. 82 (promulgated by the Standing Comm. of the Nat'l People's Cong., July 2, 1993, effective July 2, 1993, revised Mar. 1, 2003) (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=81931.

¹⁷⁹ Notice on Improving Working Conditions for Migrant Workers provides that "in every field of industry, migrant workers shall enjoy the equal treatment of job qualification requirement with fellow urban resident workers." Notice on Improving Working Conditions for Migrant Workers, *supra* note 151, at art. 1. Local government shall "vigorously [enforce] the law to crack down over-time, default payment, child labor and other violations of migrant workers' legal rights." *Id.* art. 2(2). Local government shall "support and encourage labor unions' activities under the Labor Union Law and protect migrant workers' legal rights." *Id.* art. 2(4).

¹⁸⁰ Notice on Managing and Servicing Migrant Workers, *supra* note 178, at art. 3.

¹⁸¹ *Id.* art. 2.

declaring that local governments shall not restrict migrant workers' employment opportunities by such methods.¹⁸²

c. Race / Ethnicity

Both race and ethnicity statuses are explicitly protected by the 1994 Labor Law against employment discrimination.¹⁸³ Other than this example, there appears to be no additional anti-discrimination laws in place¹⁸⁴ but for those which subsume race under ethnicity.¹⁸⁵

As for ethnic minorities, there are several laws relating to their well-being, but no substantive provisions directly prohibiting employment discrimination in the workplace except for the ethnicity provision in the Labor Law.¹⁸⁶ Therefore, employment discrimination against ethnic minorities is controlled by the Labor Law.

d. Disability / Health

Neither discrimination according to "disability" nor "health" status is prohibited by the Labor Law.¹⁸⁷ But, as stated earlier, the Disability Law prohibits employment discrimination against disabled persons.¹⁸⁸ Law on Protection of Disabled Persons was promulgated in

¹⁸² *Id.* art. 2. This notice also requires employers in certain construction projects to provide decent living conditions whenever the job requires migrant workers to live on the project premises. *Id.* art. 4.

¹⁸³ Labor Law, *supra* note 19, at art. 12.

¹⁸⁴ See discussion *supra* on III-A-1.

¹⁸⁵ For example, though not reflected in domestic laws, China appears to combine race and ethnicity when reporting its progress under the International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106, Annex, U.N. GAOR 20th Sess., Supp. No. 14, U.N. Doc A/6014 (Dec. 20, 1965). See *Ninth Periodic Reports Submitted by States Parties, supra* note 85, at 6. See also, Bai Guimei, *The International Covenant on Civil and Political Rights and the Chinese Law on the Protection of the Rights of Minority Nationalities*, 3 CHINESE J. INT'L L. 2, 441 (2004).

¹⁸⁶ The State Council suggested that local governments of the autonomous ethnic minority regions may organize and export their surplus labor to more developed cities, but they shall be "fairly treated" in the new workplace. 实施中华人民共和国民族区域自治法若干规定 [Implementing Measures on Autonomous Ethnic Region Law] art. 18 (promulgated by the St. Council, May 19, 2005, effective May 31, 2005) (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=101946 (available by subscription only). However, the regulation contained no provision about the available remedies, when an employer violates Article 18. There are also general protections. See also Law on Regional National Autonomy, *supra* note 120, at art. 23 (requiring enterprises to have preferential treatment of minority group in recruitment). See generally, Shuping Wang, *The People's Republic Of China's Policy on Minorities and International Approaches to Ethnic Groups: A Comparative Study*, 11 INT'L J. ON MINORITY & GROUP RTS. 159 (2004).

¹⁸⁷ Labor Law, *supra* note 19, at art. 12.

¹⁸⁸ Law on Protection of Disabled Persons, *supra* note 103, at art. 34; see also, INTERNATIONAL DISABILITY RIGHTS MONITOR, PEOPLE'S REPUBLIC OF CHINA: RIGHTS OF PEOPLE WITH DISABILITIES, <http://www.cirnwork.org/idrm/reports/compendium/china.cfm> (last visited Feb. 28, 2006).

1990, when the role of the private sector was yet to be recognized by the Chinese Communist Party. Therefore, the entire Law on Protection of Disabled Persons does not specifically refer to private employers. However, it is arguable that the law now appears to apply to all types of employers, including the newly-recognized group of private employers.

The Disability Law prohibits “discrimination against, insult of and infringement upon disabled persons,” and provides “equal rights with other citizens in political, economic, cultural and social fields, in family life and other aspects.”¹⁸⁹ It describes a “disabled person” as one with “visual, hearing, speech or physical disabilities, mental retardation, mental disorder, multiple disabilities and/or other disabilities.”¹⁹⁰ Another clause provides that “disabled person refers to one who suffers from abnormalities or loss of a certain organ or function, psychologically or physiologically, or in an anatomical structure and has lost wholly or in part the ability to perform an activity in the way considered normal.”¹⁹¹

Chapter IV of the Law deals with employment and Section 27 protects the “disabled person’s right to work,” combining it with “guiding principles” to promote and establish preferential hiring by state organs, nongovernmental organizations, enterprises, institutions, and urban and rural collective economic organizations.¹⁹² Section 34 clarifies that “no discrimination shall be practiced against disabled persons in recruitment, employment, obtainment of permanent status, promotion, determining technical or professional titles, payment, welfare, labor insurance or in other aspects.”¹⁹³ While arguably this law aims to promote and protect the rights of disabled persons working in “protected industries or jobs,” the language may clearly be read as broadly prohibiting employment discrimination based on disability by all employers throughout China.¹⁹⁴

The Disability Law, which predated the 1994 Labor Law, targets the needs of the sixty million disabled persons in China.¹⁹⁵ It prohibits

¹⁸⁹ Law on the Protection of Disabled Persons, *supra* note 103, at art. 3.

¹⁹⁰ *Id.* art. 2.

¹⁹¹ *Id.*

¹⁹² *Id.* arts. 27-34.

¹⁹³ *Id.* art. 34.

¹⁹⁴ In 2003, a case of employment discrimination based on disability was decided in favor of the victims. Three long-term employees, who were handicapped were terminated, but prevailed in arbitration and subsequent court processes based on the Law on the Protection of Disabled Persons. Though they did not have labor contracts, the Beijing Intermediate Level People’s Court determined they had *de facto* contracts and were entitled to a remedy. See 北京市法律援助中心, 2003 年北京市法律援助十大案例之八——法律援助为残疾职工撑起一片蓝天 [Legal Aid Center of Beijing Municipality, *The Eighth of Ten Typical Legal Aid Cases in Beijing—Legal Aid Helped Disabled Workers* (on file with author)].

¹⁹⁵ 中华人民共和国国家统计局 [NATIONAL BUREAU OF STATISTICS OF CHINA], 2004 中国统计年鉴 [2004 STAT. Y.B. CHINA] § 23-41, <http://www.stats.gov.cn/tjsj/ndsj/yb2004-c/html/indexch.htm> (last visited Mar. 4, 2006) [hereinafter 2004 STAT. Y.B. CHINA].

discrimination based on a disability, and thus would seem to fit under the Labor Law's Article 14 exemption, removing it from the Labor Law.¹⁹⁶ If that is the case, it should be noted that there is an administrative enforcement mechanism built into the law at the national level.¹⁹⁷ Therefore, absent such mechanisms at the local level, in their detailed implementing regulations local regulators could resort to the national enforcement mechanism and to the usual dispute resolution processes in resolving actual labor disputes.¹⁹⁸

Since definitions of "disability" include many health-related qualifications,¹⁹⁹ there would seem to be an overlapping relationship, and perhaps additional protections, provided to health discrimination under the disability laws. The Disability Law defines "disability" as including physical disabilities, physiological disabilities or other disabilities.²⁰⁰ An employer's use of medical examinations to ascertain health information, such as hepatitis B or HIV/AIDS, might run afoul of protections where the information pertains to an enumerated physical disability or to some "other disabilities."²⁰¹ That being so, there appears to be legislation addressing employment discrimination based on those diseases, as discussed below.²⁰²

The broadest health law regulating the entire public health system is the Contagious Disease Law, which was passed in 2004 in the wake of SARS.²⁰³ Under Article 16 of this law, any person suspected of being a carrier of a contagious disease, including HIV/AIDS or hepatitis B, must be allowed to work *unless* there is a statutory provision explicitly prohibiting persons with those conditions from working.²⁰⁴ Therefore,

¹⁹⁶ Law on the Protection of Disabled Persons, *supra* note 103, at arts. 3, 34; Labor Law, *supra* note 19, at art. 14.

¹⁹⁷ Where the lawful rights and interests of disabled persons are violated, victims or their relatives "shall have the right to appeal to the competent authorities for disposition, or institute lawsuits at people's courts in accordance with the law." Law on the Protection of Disabled Persons, *supra* note 103, at art. 49. In other words, victims can either petition the relevant local government agency to obtain an administrative decision, or file a civil action in the court for injunctive remedies.

¹⁹⁸ In addition to the remedy of labor arbitration, victims of discrimination can directly bring the suit to People's Court. *Id.* art. 49.

¹⁹⁹ See 残疾人实用评定标准(试用) [Interim Rules on the Qualification for Disability] (P.R.C.) (on file with author).

²⁰⁰ *Id.* art. 2.

²⁰¹ *Id.*

²⁰² Civil Service Law also covers health/disability issues in public employment. Civil Service Law, *supra* note 18, at arts. 11-29. For example, qualification is defined under art. 11(5); mandatory disqualification is defined under art. 24; and the standards for physical exams are governed by the relevant rules from the Ministry of Health. *Id.* art. 29.

²⁰³ Contagious Disease Law, *supra* note 119.

²⁰⁴ *Id.* art. 16. The law provides that any person who has a contagious disease carries a contagious disease, or is suspected of being a carrier of a contagious disease shall not be allowed work in positions that are susceptible to their spreading, as prohibited by the law, administrative rulings or regulations from the State Council. Contagious disease is defined by Article 3. *Id.* art. 3.

there can be no employment discrimination against workers with HIV/AIDS or hepatitis B unless and except required by statute. Unfortunately, the law itself does not seem to contain any penalties or remedies for victims of such discrimination.²⁰⁵

In addition to the above law, the Ministry of Health has issued new regulations clarifying which types of medical conditions, including certain types of hepatitis B and HIV/AIDS, disqualify applicants from being hired in the public service.²⁰⁶ These regulations are limited in that they apply only to civil servant positions and not to positions in other sectors.²⁰⁷ Furthermore, the regulations appear to be limited to the just hiring process.²⁰⁸ Incumbent government employees are not directly covered by this regulation, but perhaps will benefit indirectly from the clarification since they are otherwise protected by the Contagious Disease Law.²⁰⁹

In sum, China has legal protections against health and disability discrimination, including the specific diseases of HIV/AIDS and hepatitis B, and despite some limitations, the protection from discrimination itself is rather significant.²¹⁰ Since the Contagious Disease Law forbids HIV/AIDS or hepatitis to be a basis for denying employment except where statutes so require,²¹¹ Article 16 indirectly functions as a protection against employment discrimination by public and private sector

²⁰⁵ *Id.* art. 16. The new laws may soon be tested; it is reported that a new case has been brought in a Beijing court by an applicant denied a job with Shenzhen Airlines because he had suffered Hepatitis-B in the past. *Hep B Discrimination Case Hits Court*, CHINA DAILY, July 8, 2005, at 5.

²⁰⁶ Health Qualifications for Hiring Civil Servants, *supra* note 119.

²⁰⁷ *Id.* art. 2.

²⁰⁸ *Id.*

²⁰⁹ However, the new Health Qualifications for Hiring Public Servants, while banning some forms of employment discrimination, address and disqualify applicants who may have a number of health risks, including serious heart disease and other heart conditions (*Id.* art. 1), elevated blood pressure (*Id.* art. 2), TB positive status (*Id.* art. 4), Hepatitis A, B, C positive status (*Id.* art. 7), kidney disease (*Id.* art. 9), STD and HIV positive status (*Id.* art. 8), diabetes (*Id.* art. 10), severe vision/hearing impairment (*Id.* arts. 19-20), and other medical conditions that effect satisfactory job performance (*Id.* art. 21).

Further detailed analysis of numbers of legal issues (such as privacy) related to health discrimination can be found in Ye & Wei, *supra* note 108; and see Civil Service Law, *supra* note 18, at arts. 24 and 29, which appear to extend the coverage to all applicants in civil service required to take a physical exam.

²¹⁰ There is at least one successful law suit against discrimination based on Hepatitis B which occurred in 2004. See, Liang Chao, *supra* note 10.

²¹¹ Contagious Disease Law, *supra* note 119, at art. 16. The original text is “疑似传染病病人，在治愈前或者在排除传染病嫌疑前，不得从事法律、行政法规和国务院卫生行政部门规定禁止从事的易使该传染病扩散的工作 [Infectious disease patients, pathogen carriers and suspected infectious disease patients shall, before they are cured or cleared of suspicion, be barred from jobs which the health administration department under the State Council prohibits them from doing because of the likelihood of causing the spread of infectious diseases].” *Id.*

employers (except for civil servant applicants) where no statutory exceptions exist.²¹²

e. Religious Belief

The Labor Law prohibits workplace discrimination for religious belief,²¹³ and other laws and regulations relating to religious activities do not include employment discrimination in the workplace.²¹⁴ There seems to be little anecdotal evidence that employment discrimination based on religious belief occurs, except as where discrimination based on religious beliefs might be combined with discrimination based on race or ethnic minority status. In one case involving a Muslim member of the *Hui* nationality, a job as a cook was first offered but then later withdrawn upon the employer discovering the Muslim's religious beliefs would not allow him to cook pork for the customers of the employer.²¹⁵ The case was taken to the labor arbitration committee which decided in favor of the employer.²¹⁶

f. Other Categories: Age and Height

i. Age

Age discrimination is not prohibited in employment. In fact, it is embedded in the legal retirement ages, in the requirements of some government positions, as well as in the practice by many employers.²¹⁷

²¹² With the addition of China's 2005 Civil Service Law which also addresses health issues, discussed *infra*, that statutory prohibition appears limited to contagious "carriers" of hepatitis B, etc. Civil Service Law, *supra* note 18, at art. 29.

²¹³ Labor Law, *supra* note 19, at art. 12.

²¹⁴ Arguably criminal prosecution could be used in an employment context against violators. See Criminal Law, *supra* note 120, at art. 251 (imposing 2-year imprisonment for violation of religious rights committed by public officials). For a discussion of religious freedom in China, see generally, Anne S.Y. Cheung, *In Search of a Theory of Cult and Freedom of Religion in China: the Case of Falun Gong*, 13 PAC. RIM L. & POL'Y J. 1 (2004).

²¹⁵ 劳动法新类型案例精析 [DISCUSSIONS ON THE NEW TYPES OF LABOR LAW CASES] 123-24 (张步洪、张吕好 [Zhang Buhong & Zhang Luhao] eds., 人民法院出版社 [People's Court Press], 1997) [hereinafter DISCUSSIONS ON THE NEW TYPES OF LABOR LAW CASES]. See also 劳动法新释与例解 [NEW ANNOTATED LABOR LAW AND CASES] 58-59 (黄成建 [Huang Chengjian] ed., 同心出版社 [Tongxin Press], 2001).

²¹⁶ DISCUSSIONS ON THE NEW TYPES OF LABOR LAW CASES, *supra* note 215, at 124.

²¹⁷ See discussion in Cai Shangyao, *Age Discrimination's High Cost to Society*, SHANGHAI STAR, Dec. 16, 2004, at 4, available at <http://www.shanghai-star.com.cn/2004/1216/vo2-1.html>.

ii. Height

Height discrimination has been litigated in at least one case.²¹⁸ Part of the claim was based upon the Constitution, which states “all citizens of the People’s Republic of China are equal before the law.”²¹⁹ In December 2001, Jing Tao brought a law suit in Wuhou District Court after the Chengdu Branch of the People’s Bank of China denied him a job because of his height.²²⁰ The advertisement for the job, among other qualifications, required male applicants to be over 168 centimeters, which was estimated to exclude 40% of the men in Sichuan. His case was first accepted, but later dismissed as non-justiciable because during the interim the bank had dropped the height requirement, and because such personnel decisions were determined to be exempt from the Administrative Litigation Law.²²¹

3. Local Government Discrimination Bans

Since China’s legal system produces very general and often undefined legislation at the national level, “local detailed implementing regulations” are necessary for the local enforcement of labor laws through the local labor bureaus and their labor arbitration commissions.²²² In general, most provinces have incorporated anti-discrimination provisions into their local labor regulations. For example, the Tianjin Employment Regulation states that an “employee shall enjoy equal protection of the law when seeking employment opportunities; [an] employee shall have the freedom to choose his occupation; [an] employee shall not be

²¹⁸ See Michael C. Dorf, *What a Chinese Height Discrimination Case says about Chinese and American Constitutional Law*, FINDLAW, May 26, 2004, at http://writ.news.findlaw.com/scripts/prINTER_FRIENDLY.pl?page=/dorf/20040526.html.

²¹⁹ 宪法 [CONST.] art. 33 (2004) (P.R.C.).

²²⁰ Plaintiff argued the local limitations were in conflict with China’s Constitution, See 宪法 [CONST.] art. 100 (2004) (P.R.C.); 中华人民共和国立法法 [Legislation Law] arts. 63-64 (promulgated by the Standing Comm. of the Nat’l People’s Cong., Mar. 15, 2000, effective July 1, 2000) 03/2000 全国人民代表大会常务委员会公报 [STANDING COMM. NAT’L PEOPLE’S CONG. GAZ.] 112 (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=34719 [hereinafter Legislation Law]; Kahn, *supra* note 129; see also, Dorf, *supra* note 218.

²²¹ Dorf, *supra* note 218.

²²² 宪法 [CONST.] art. 100 (2004) (P.R.C.). Legislation Law, *supra* note 220, at arts. 63-64.

discriminated against on the grounds of gender, race, ethnicity and religion.”²²³

b. Law and HRM Practices

1. Recruitment

Current labor market regulations covering the recruitment of employees provide both flexibility and limitations for employers in their search for employees. These include allowing job centers, employment agencies, media advertising, the use of the Internet, job fairs, etc.²²⁴ In addition to the regulatory requirements and procedures discussed earlier, an additional legal limit on the use of media advertisements is found in the Advertisement Law, which states the ad shall not contain any racial, ethnic, or religious discriminatory language.²²⁵

American human resource managers and employers commonly use screening techniques, such as minimum qualifications, written applications and examinations, interviews, reference checks, lie detector

²²³ 天津市劳动就业管理条例 [Regulation of Tianjin Municipality on the Management of Labor and Employment] art. 10 (promulgated by the Standing Comm. of Tianjin Municipal People's Cong., Sept. 14, 2000, effective Nov. 1, 2000, revised Mar. 24, 2005) (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=100951 [hereinafter Tianjin Employment Regulation]; see also 江苏省劳动力市场管理条例 [Regulation of Jiangsu Province on the Management of Labor Market] art. 7 (promulgated by the Standing Comm. of Jiangsu Province People's Cong., Aug. 20, 2004, effective Sept. 1, 2004) (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=97370 [hereinafter Jiangsu Labor Market Regulation]; 湖北省劳动合同规定 [Regulation of Hubei Province on Labor Contract] art. 8 (promulgated by the Standing Comm. of Hubei Province People's Cong., Mar. 1, 2005, effective Mar. 1, 2005) (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=100171 [hereinafter Hubei Labor Contract Regulation]. Similar protections for women also exist at the local levels. See, e.g., 江苏省实施《中华人民共和国妇女权益保障法》办法 [Provisions of Jiangsu Province on Implementing the Law on Protection of Women's Rights and Interests] (promulgated by the Standing Comm. of the Jiangsu People's Cong., July 31, 1997, effective Mar. 1, 1995), available at http://www.chinacourt.org/flwk/show1.php?file_id=52219 [hereinafter Jiangsu Women's Rights Provisions].

²²⁴ Regulations on Labor Market Management, *supra* note 21, at art. 8.

²²⁵ Advertisement Law, *supra* note 33, at art. 7(7). The Regulation of Labor Market Management also has this same ban on discrimination, and adds, “except for those provided by state laws concerning unsuitable types of work or positions.” The Regulations on Labor Market Management, *supra* note 21, at art. 11. Under the Labor Market Regulation's ban on use of discriminatory language, the ad first needs approval from the Labor Bureaus which would screen out improper ads, though practical experience (and reading newspapers) belies that either a request or a ban occurs with any frequency. *Id.* art. 9. In contrast, in the United States, ads containing discriminatory language or suggestive language, such as gender or age preferences (e.g., “boys or girls,” students, or recent graduates), while not prohibited, may be used as evidence in proving discriminatory intent. 29 C.F.R. § 1625.4(a) (2000). The U.S. Supreme Court has found such limitation does not infringe on the free speech guarantees of the First Amendment. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973).

tests, and medical tests that limit the number of applicants to a more manageable number.²²⁶ However, most of these do not appear to be used to any noticeable extent in China, except occasionally by some of the FIEs.²²⁷ In the United States, a recent report stated that “[o]ver the past few years personality assessment tests have moved from the realm of experiment to standard practice at many of the nation’s largest companies A recent survey showed that about 30% of all companies use personality tests in hiring. To many companies, the tests are as important, if not more important, than applicants’ education, experience and recommendations.”²²⁸ It would appear China has not yet taken this path.

One serious issue in China is the question of whether job applicants are afforded meaningful protection against discrimination. The Labor Law grants labor rights only to “laborers who form a labor relationship” and “laborers who form a labor contract relationship.”²²⁹ Therefore, the Labor Law seems inapplicable to applicants, who, without an employment relationship, have no “labor dispute.”²³⁰

The Labor Market Regulation prohibits employers from discriminating in hiring and requires employment agencies to recruit and promote the employment of job seekers through fair competition.²³¹ While neither the Regulation nor the Rules on HRM provide a right with remedy for individuals, the Rules provide for fines of ¥10,000 to ¥30,000 for violations, to be administered by the labor bureaus.²³² Most local

²²⁶ David Pollitt, *Recruiting for Success: Challenges and Solutions*, 12 HUM. RESOURCE MGMT. INT’L DIG. 24, 24, Dec. 2004.

²²⁷ See Taylor, *supra* note 18, at 11-18. Commercial services are available in China for pre-employment screening. See, e.g., Inquest Pre Employment Screening Service, *supra* note 18.

²²⁸ Ariana Eunjung Cha, *Employers Relying on Personality Tests to Screen Applicants*, WASH. POST, Mar. 27, 2005, at A01. Meanwhile, in China recruiting practices seem to be developing, though not always in an understandable way. For example, in Guangzhou, a job ad asked for at least a B.A. degree for a driver’s position. Other recruiting agencies admit that there are really no fixed guidelines to determine the qualification, or even if there is, the actual screening process may disregard those stated qualifications. See 木工电工一起招 大学生招聘门槛低惹非议 [Controversy Arises on the Low Job Requirement of College Graduates], 南方日报 [S. DAILY], Dec. 27, 2004, http://gd.dayoo.com/gb/content/2004-12/07/content_1841929.htm.

²²⁹ Labor Law, *supra* note 19, at art. 2. Though there can be an “implied” labor contract relationship, these have arisen where a worker has actually been hired and is working without a labor contract. Regulation of the Ministry of labor on Institution of Labor Contract System, *supra* note 20, at art. 14.

²³⁰ By contrast, the Women’s Rights Law explicitly purports to protect women applicants with its provision against discrimination in hiring. Women’s Rights Law, *supra* note 135, at art. 22. From the wording of the law, this remedy would arguably appear to be available to male applicants as well. *Id.* art. 21 (stating that men and women are to enjoy equal employment rights).

²³¹ Regulations on Labor Market Management, *supra* note 21, at arts. 7, 11.

²³² Rules on the Administration of Human Resources Market, *supra* note 36, at art. 39. By contrast, the Regulations only provide sanctions for violations by employment agencies, such as “jobs for men only” or for jobs for which women are ineligible due to “protective” legislation can result in fines. Regulations on Labor Market Management, *supra* note 21, at art. 37.

government regulations follow the national law in not clearly providing relief for applicants in cases of employment discrimination.²³³ For example, Hubei Province includes applicants in its prohibition of discrimination, however, the article that does so lacks any apparent enforcement provision.²³⁴

The 1990 Disability Law protects disabled workers from discrimination in hiring, in addition to its guarantees of ordinary working conditions, equal pay, promotion, and termination.²³⁵ Migrant workers are protected by new anti-discrimination provisions which state the hiring requirement shall be the same for migrant workers as for local residents.²³⁶ These same provisions grant migrant workers "access to labor arbitration."²³⁷

In sum, though protective labor laws seem to cover applicants who are victims of employment discrimination, enforcement remains problematic. Victims of employment discrimination normally must bring a labor dispute to the Labor Bureau's Labor Arbitration Commission, which sets up an ad hoc labor arbitration tribunal to resolve the dispute.²³⁸ A remedy for such applicants is likely unavailable, however, because they lack a true labor dispute. The Labor Law describes a "labor dispute" as being between the employing unit and a laborer."²³⁹ Parties may only apply to mediation or arbitration, or take legal proceedings "according to law."²⁴⁰

²³³ See, e.g., Jiangsu Labor Market Regulation, *supra* note 223, at art. 7, and Tianjin Employment Regulation, *supra* note 223, at art. 10, both of which parallel art. 12 of the Labor Law. Labor Law, *supra* note 19, at art.12.

²³⁴ Hubei Labor Contract Regulation, *supra* note 223, at art. 8.

²³⁵ Law on Protection of Disabled Persons, *supra* note 103, at art. 34.

²³⁶ Notice on Improving Working Conditions for Migrant Workers, *supra* note 151, at art. 1(1). It might be noted the provisions target only hiring and not other employment conditions; also, local resident "applicants" are without a labor contract and not covered by the Labor Law.

²³⁷ *Id.* art. 2-3.

²³⁸ *Some Opinions*, *supra* note 20.

²³⁹ Labor Law; *supra* note 19, at art. 77.

²⁴⁰ *Id.* "According to law" would seem to encompass Article 79 and require labor arbitrations. *Id.* art. 79. The parties are also authorized to "directly apply to the labor dispute arbitration committee," and, if the party is not satisfied with the decision of arbitration, it may bring a lawsuit in the people's court. *Id.* The regulations on settlement of labor disputes in arbitration are applicable to "labor disputes between the enterprise and employees in China." (emphasis supplied) 中华人民共和国企业劳动争议处理条例 [Regulations on Settlement of Labor Disputes in Enterprises] art. 2 (promulgated by the St. Council, July 6, 1993, effective Aug. 1, 1993) (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=17631. "Labor disputes" can arise from HRM decisions in employment, labor contracts, and "implementation of relevant state regulations on . . . labor protection." *Id.* art. 2(2). The right to interpret these Regulations is vested in the administrative department of labor under the State Council. *Id.* art. 4(2).

For trials of labor disputes following arbitration, in 2001 the Supreme People's Court added an interpretation on labor disputes.²⁴¹ The legal issue for the Court was whether a job applicant has a justiciable claim, and the Court ruled that in cases not involving employment discrimination applicants do not have a claim, the applicant must first go to labor arbitration.²⁴² However, since applicants do not qualify as having labor disputes, they are ineligible to litigate.²⁴³

In the case of gender discrimination, the Women's Rights Law purports to provide additional arguments and possible alternatives to the applicant. When a female applicant is discriminated against in employment decisions,²⁴⁴ she can bring a complaint to the local women's organization to request administrative sanctions, file for arbitration, or file a lawsuit.²⁴⁵ The open question then is whether the complainant, when attempting to go to court, must "in accordance with the law" have first gone to labor arbitration over this "labor dispute," and, if so, whether an applicant's lack of an employment relationship will in practical terms foreclose access to the arbitration process and thereafter possibly the

²⁴¹ 最高人民法院关于审理劳动争议案件适用法律若干问题的解释 [Interpretation of the Supreme People's Court Concerning Several Issues Regarding the Application of Law to the Trial of Labor Dispute Cases] (promulgated by the Sup. People's Ct., Apr. 16, 2001, effective Apr. 30, 2001) 01/2001(3) 最高人民法院公报 [SUP. PEOPLE'S CT. GAZ.] 88 (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=37160 [hereinafter Interpretation on Labor Arbitration].

The Interpretation states the Court shall accept and hear the case where, (1) Disputes occurred between the employee and the employing work unit in the course of performing a labor contract; and (2) disputes occurred whereby the employee and his employing work unit fail to conclude a written labor contract between them but the labor relationship has existed. *Id.* art. 1(1)(2). Article 2 stipulates where a Labor Dispute Arbitration Commission decides not to accept the case on the ground it is not a "labor dispute", but the party nevertheless files a lawsuit, the court shall thereafter decide that issue. *Id.* art. 2.

²⁴² *Id.* art. 2.

²⁴³ Remedies in this situation appear to be limited since access to labor arbitration is not authorized. There seems to be a strong consensus that the enforcement mechanism in dealing with hiring discrimination is rather weak. 就业歧视凸显法律空白 [*The Blank Point of Employment Discrimination*], 新华网 [XINHUA NEWS AGENCY], Feb. 19, 2005, http://news.xinhuanet.com/focus/2005-02/19/content_2547515.htm.

²⁴⁴ The scenario is in violation of Article 23 of Women's Rights Law. Women's Rights Law, *supra* note 135, at art. 23.

²⁴⁵ Women's Rights Law, *supra* note 135, at arts. 52-53. 邵晓寅, 私营企业劳资冲突的现状和对策 [Shao Xiaoyin, *Study on Labor Relations in Private Enterprises*], 晋阳学刊 [JINYANG J.], Feb. 2003, at 56. Some local labor laws offer similar remedial approaches. For example, in Jiangsu Province the government can impose administrative penalties for gender discrimination, including in "hiring". Jiangsu Women's Rights Provisions, *supra* note 223, at art. 33. Also, it appears some provinces are considering using additional remedies against discriminatory policies, including use of fines. 辽宁省促进就业规定 [Regulation of Liaoning Province on Promoting Employment] arts. 16, 37, 41 (promulgated by the Liaoning Province People's Government, July 1, 2005, effective Aug. 15, 2005) (P.R.C.), available at http://www.ln.gov.cn/communiqué/govfiles/govorder/36_47831.htm.

court.²⁴⁶ If the case is not a proper labor dispute, then whether it falls under the other cases within the jurisdiction of the People's Courts allowing a court to hear the case, or whether it is possibly channeled directly to labor arbitration, remains unclear.²⁴⁷

In sum, applicants who have been improperly discriminated against may lack meaningful enforcement procedures and effective remedies under current Chinese laws. While U.S. labor laws usually provide labor rights to *employees*, federal Equal Employment Opportunity laws protect all *individuals* against discrimination, including applicants.²⁴⁸

Applicants for government jobs fall under China's civil service system, and thus have a distinct administrative avenue not available for private sector applicants.²⁴⁹ For example, in Beijing, any dissatisfied applicant for a civil service position may submit a request for an administrative review to the local personnel bureau.²⁵⁰ Where there is a legal source prohibiting employment discrimination, an applicant may

²⁴⁶ 专家学者悉数劳动法十大缺陷 [Experts and Scholars Name the Ten Deficiencies of Labor Law], 法制日报 [LEGAL DAILY], Oct. 13, 2004, at 10, available at http://www.legaldaily.com.cn/bm/2004-10/13/content_140106.htm.

²⁴⁷ Interpretation on Labor Arbitration, *supra* note 241, at art. 2(2). Victims of disability discrimination also can "directly access" the court after similar analysis. Law on the Protection of Disabled Persons, *supra* note 103, at art. 49.

²⁴⁸ For example, under Title VII of the Civil Rights Act, it shall be unlawful to refuse to hire any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C. § 2002e (a)(1) (2005). Under the National Labor Relations Act, it is unlawful to discharge or otherwise discriminate against an employee because he has filed charges or given testimony. National Labor Relations Act (NLRA), § 8(4), 29 U.S.C. § 158(4) (2005). The NLRA though defining and protecting "employees" also has been interpreted to include applicants who are, for example, denied jobs because of their views or activities on unions. *See NLRB v. Town & County Electric Inc.*, 516 U.S. 85 (1995) (holding that job applicants are statutory employees). Where legislation is unclear, the court will look to common-law definitions of employee. *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 447 (2002).

²⁴⁹ Job applicants can obtain administrative re-considerations from local personnel bureau for any hiring irregularity. Civil Service Law, *supra* note 18, at art. 101(1). In China, the Labor Law excludes civil servants from coverage. 关于《中华人民共和国劳动法》若干条文的说明 [Guidance on Certain Provisions of the Labor Law], art. 4 (promulgated by the Ministry of Labor, Sept. 5, 1994, effective Sept. 5, 1994) (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=20633.

²⁵⁰ 北京市人事争议仲裁办法 [Measures of Beijing Municipality for Arbitration of Personnel Disputes] art. 2 (promulgated by Beijing People's Government, Mar. 7, 2003, effective May 1, 2003) (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=84147 [hereinafter Beijing Arbitration Measures].

argue there has been an “abuse of discretion.”²⁵¹ However, for non-applicants (i.e. employees) the Supreme People’s Court has issued provisions prescribed “in accordance with the Labor Law,” which declare that “cases over personnel disputes [labor disputes in government service] between public institutions and their staff members” that relate to “resignation, dismissal and implementation of employment contracts,” will be resolved through a “personnel dispute arbitration institution.”²⁵² However, arbitration must be sought before bringing a personnel dispute suit in court. The 2005 national Civil Service Law provides for fair and open recruitment.²⁵³ Under that law, “employment disputes” shall be submitted for administrative review established by the employer²⁵⁴ with judicial review governed by the administrative laws (i.e. departing from ordinary court procedures).²⁵⁵ The 2005 Civil Service Law limits arbitration to those disputes arising out of the labor contract.²⁵⁶

Administrative review may thus be possible if some provision prohibiting employment discrimination applies. In the alternative, there may be an “abuse of discretion” where there is fair and open recruitment. However, review is only possible if applicants are indeed eligible for review, which, given the nature of the civil service process, seems likely. The remedy for a violation under such process should at least include sending the application back for proper reconsideration.²⁵⁷ Therefore, in the civil service personnel dispute process involving labor arbitration, the procedures for review appear to parallel those in the private sector, with the same issues relating to the eligibility of applicants and justiciability in courts.

²⁵¹ Under the new Civil Service Law, a victim of discriminatory employment policy can file a complaint for administrative reconsideration of personnel decisions. Civil Service Law, *supra* note 18, at art. 90. If the reviewing agency finds sufficient evidence to show any abuse of discretion, the law requires reversal of the discretionary decision. 中华人民共和国行政复议法 [Administrative Reconsideration Law] art. 28 (promulgated by the Standing Comm. of the Nat’l People’s Cong., Apr. 29, 1999, effective Oct. 1, 1999) 05/1999 全国人民代表大会常务委员会公报 [STANDING COMM. NAT’L PEOPLE’S CONG. GAZ.] 225 (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=32741.

²⁵² 最高人民法院关于人民法院审理事业单位人事争议案件若干问题的规定 [Provisions of the Supreme People’s Court on Issues Related to the People’s Courts’ Trial of Personnel Dispute Cases Occurred in Institutions] art.1 (promulgated by the Sup. People’s Ct., Aug. 27, 2003, effective Sept. 5, 2003) 01/2003(5) 最高人民法院公报 [SUP. PEOPLE’S CT. GAZ.] 5 (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=88232; see also, Beijing Arbitration Measures, *supra* note 250, at art. 2.

²⁵³ Civil Service Law, *supra* note 18, at art. 21.

²⁵⁴ *Id.* art. 90.

²⁵⁵ *Id.*

²⁵⁶ *Id.* art.100.

²⁵⁷ *Id.* art. 92.

2. Employment and Termination

Illegal discrimination in the workplace involving terms and conditions of employment can be found in many employment contexts, including job descriptions, positions, hours, overtime, wages, promotions, evaluations, benefits, layoffs, recalls, discipline, and termination.²⁵⁸

Overall, disputes were mostly economic in nature, with welfare and social insurance payments being the most common.²⁵⁹ However, occasional reports suggest the presence of a significant number of cases involving employment discrimination. Zhang Zheng, an official of the arbitration service of the Xicheng District of Beijing, commenting on arbitration cases involving discrimination against women because of marriage, pregnancy, or maternity leave claimed that "[t]he arbitration service [in his district] last year received 80 cases involving violation of women workers' rights . . . and the number of such cases is rising."²⁶⁰ Though the actual number of discrimination-related labor dispute cases may be difficult to ascertain, there seems to be abundant documentation of incidents in the workplace.²⁶¹ It is the terms and conditions of employment, created by statute and contract, which, if granted or denied for discriminatory reasons, create the basis for a labor dispute. In addition to compensation claims, the next largest categories of labor contract violations in labor arbitration cases are the rescinding and terminating of labor contracts.²⁶² In view of the earlier-described anecdotal incidents of discrimination involving layoffs and terminations of employees, it is reasonable to predict that a number of these cases involve illegal employment discrimination.

²⁵⁸ In the United States, there is a wide variety of discriminatory practices and laws seeking to prohibit them. See LEWIS & NORMAN, *supra* note 91 and FRED S. STEINGOLD, THE EMPLOYER'S LEGAL HANDBOOK §§ 8.3-8.18 (5th ed. 2002).

²⁵⁹ Jeremy B. Fox et al., *The Arbitration of Labor Disputes in China Today: Definition and Implications*, 17 EMP. RESP. & RTS. J. 19, 27 (2005).

²⁶⁰ *Mother or Worker: Chinese Women Face New Challenges*, PEOPLE'S DAILY, Aug. 15, 2003, http://english.people.com.cn/200308/24/eng20030824_122955.shtml.

²⁶¹ Chinese scholars have conducted their own empirical studies on issues of employment discrimination. For example, in 2002 年人口与劳动问题报告 - 城乡就业问题与对策 [A REPORT ON POPULATION AND LABOR PROBLEMS IN CHINA IN 2002: EMPLOYMENT PROBLEMS AND COUNTERMEASURES IN CITIES AND COUNTY] (蔡昉 [Cai Fang] et al. eds., 社会科学文献出版社 [Social Sciences Documents Publishing Co.] 2002), the authors applied the demand-supply of the labor market to analyze workplace discrimination. See also, AM. CTR. FOR INT'L LABOR SOLIDARITY, *supra* note 78, at 38-58.

²⁶² In 2004, there were a reported 76,744 compensation cases, 40,017 rescission cases, and 12,043 wrongful termination cases, and 1,540 arbitrations over layoffs. 2004 STAT. Y.B. CHINA, *supra* note 195, at § 23-5.

Gender discrimination in the Chinese workplace receives the most attention.²⁶³ In a 2002 report, the World Bank concluded “traditional gender stereotypes and values have re-emerged, including increasing gender discrimination in the labor market. Women are often employed in lower status, lower paid jobs. During the transition, women have had a harder time than men in obtaining and keeping jobs.”²⁶⁴ Studies of Chinese government statistics show women tend to be employed in occupations where average earnings are lowest and in collectively-owned or privately owned sectors which are on average smaller and with lower pay and less welfare.²⁶⁵

Termination based on discriminatory reasons is not comprehensively dealt with in the labor contract provisions of the Labor Law. Instead, these provisions merely mandate that certain termination provisions that limit the employer and the employee in the exercise of ending an employment relationship are included in the contract.²⁶⁶ However, it is noteworthy that these provisions prohibit termination based on being female, during pregnancy, or while nursing, but are silent in protecting employees against being terminated generally on a discriminatory basis. Instead, they rely upon the general anti-discrimination provisions of the Labor Law and other labor laws, as discussed above.²⁶⁷

c. *Enforcement*

1. Administrative Process

China's current system for enforcing individual labor rights is to first channel them into intra-enterprise mediation, and then into arbitration under labor bureaus vertically connected with the MOLSS and horizontally connected with local governments.²⁶⁸ These labor bureaus set up labor arbitration commissions and establish tribunals to resolve

²⁶³ 苏敏, 全国总工会调查: 现行法规难保女职工劳动权益 [Su Min, *ACFTU Reports: Current Law Can't Protect Women Workers' Rights*], 中国青年报 [CHINA YOUTH DAILY], Feb. 27, 2004, at 2.

²⁶⁴ CHINA COUNTRY GENDER REVIEW, *supra* note 152, at 14.

²⁶⁵ Fang Lee Cooke, *Equal Opportunity? The Role of Legislation and Public Policies in Women's Employment in China*, 16 WOMEN IN MGMT. REV. 334, 340 (2002); *see also*, Charles J. Ogletree & Rangita de Silva-de Alwis, *When Gender Difference Become a Trap: The Impact of China's Labor Law on Women*, 14 YALE J.L. & FEMINISM 69 (2002). *See generally*, Xiao-Yuan Dong et al., *supra* note 81, at 979.

²⁶⁶ Labor Law, *supra* note 19, at arts. 19(6), 24-27, 29(3).

²⁶⁷ *Id.* art. 12.

²⁶⁸ *Id.* arts. 77-84; Regulations on Settlement of Labor Disputes in Enterprises, *supra* note 240, at arts 7, 12.

labor disputes as individual cases arise.²⁶⁹ The tribunals are staffed with arbitrators who are usually from the labor bureau, but also include arbitrators from outside of the labor bureau who meet certain qualification standards.²⁷⁰

The labor tribunals mediate and arbitrate the labor rights issues that arise from both contracts and statutes.²⁷¹ These include individual and collective labor contracts, as well as labor rights under the Labor Law, the Women's Rights Law, etc.²⁷² Parties to the arbitration may be represented by lawyers at the hearing during the preliminary gathering of evidence, which is conducted by the arbitrator to elicit the facts and arguments so as to allow for the application of the laws and regulations.²⁷³

Judicial review is available only after a labor arbitration decision is made, and, being a *de novo* procedure, it greatly nullifies the arbitration process and decision but for the experience of preparation.²⁷⁴ The time and expense of this second procedure is especially burdensome to the claimants, who are often workers of very modest means. On the other hand, the judicial proceeding provides supervision for local labor arbitration committees.

The administrative process to access mediation or arbitration or take legal proceedings according to law is the requirement that there be a *labor dispute* arising out of a labor contract relationship.²⁷⁵ The 1993 Regulation on Labor Disputes applies to the following categories of labor disputes:

- (1) disputes arising out of expulsion, discharge or lay-off of employees by enterprises, resignation by employees, or employees voluntarily leaving their posts;

²⁶⁹ Labor Law, *supra* note 19, at art. 77.

²⁷⁰ For example, the arbitration committee can include some outside arbitrators working on a part-time schedule. See 广州市劳动争议仲裁办法 [Regulation on Labor Arbitration of Guangzhou Municipality] art. 14 (promulgated by the Guangzhou Municipality, Aug. 24, 1998, effective Sept. 15, 1998) (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=64492.

²⁷¹ For jurisdiction over contract claim, see Interpretation on Labor Arbitration, *supra* note 241, at art. 1(1). For jurisdiction over statutory claim, such as workers' com, see 劳动和社会保障部办公厅关于处理工伤争议有关问题的复函 [Reply Letter on Labor Dispute over Workplace Injuries] art. 2 (promulgated by the Labor & Soc. Sec., Apr. 11, 2000, effective Apr. 11, 2000) (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=34897.

²⁷² *Some Opinions*, *supra* note 20.

²⁷³ 企业劳动争议调解委员会组织及工作规则 [Guidelines on the Organization and Work of the Committee of Arbitration on Labor Disputes in Enterprises] art. 9 (promulgated by the Ministry of Labor, Nov. 5, 1993, effective Nov. 5, 1993) (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=18356 [hereinafter Arbitration Guidelines].

²⁷⁴ The standard of review is *de novo*. See Interpretation on Labor Arbitration, *supra* note 241, at art. 21(2).

²⁷⁵ *Id.* art. 77. In fact all provisions in the Labor Law relating to arbitration require a labor dispute. *Id.* arts 78-84.

- (2) disputes arising out of the implementation of relevant state regulation on wages, insurance, welfare, training, and labor protection;
- (3) disputes arising out of performance of labor contracts; and
- (4) other labor disputes that shall be handled according to these Regulations as prescribed by laws or other regulations.²⁷⁶

In 2004, the MOLSS reported there were nearly 260,000 labor disputes nationwide, affecting some 760,000 workers,²⁷⁷ marking a 15.2% increase in the number of disputes over the prior year.²⁷⁸ Of these, 93.2% (259,000) were reported to have been resolved: 26% by mediation (67,765), 37% by arbitration (95,774), and 26% (67,340) by other means.²⁷⁹ The question for purposes of this article is how many of the above cases, if any, involved elements of illegal employment discrimination.²⁸⁰

In the United States, the administrative agency which primarily enforces most anti-discrimination laws is the Equal Employment

²⁷⁶ Regulations on Settlement of Labor Disputes in Enterprises, *supra* note 240, at art. 2. Presumably, applicable discrimination prohibitions in the Labor Law and other anti-discrimination laws are included in these categories. The Supreme People's Court in an interpretation further confirmed the requirement of a "labor dispute" in order to have the case heard by the courts. Interpretation on Labor Arbitration, *supra* note 241, at art. 1. It also provides these disputes must occur "in the course of performing a labor contract" or where a labor relationship had existed. *Id.* art. 1(1)(2). Judicial review of a labor arbitration commission decision finding no labor dispute will be "accepted" by the court only if the court disagrees or, finds it "falls under other cases within the jurisdiction of the people's court." *Id.* art. 2(1)(2).

²⁷⁷ 2004 STATISTICS, *supra* note 131; see also State Dept. Rpt., *supra* note 58.

²⁷⁸ 2004 STATISTICS, *supra* note 131.

²⁷⁹ *Id.* In 2004, it was recorded that 19,000 cases were labor rights disputes arising under *collective* contracts, which is a remarkable 72.7% increase from the previous year. *Id.* The detailed 2004 statistical breakdown of labor arbitration cases by nature of dispute is as follows:

	Total	Private Enterprise	FIE	Public Enterprise	Others
Compensation	76,774	42,069	7,775	22,805	4,125
Contract Modification	5,494	2,153	480	2,480	381
Rescind Contract	40,017	17,019	5,090	15,646	2,262
Wrongful Termination	12,043	4,245	1,608	5,589	601
Lay-off	1,540	388	49	1,008	95

Source: 2004 STAT. Y.B. CHINA, *supra* note 195, at § 23-5.

²⁸⁰ Cases appear to fall under the substantive issue raised by a claim of discrimination. For example, wage discrimination would be categorized as a wage claim. It was reported that in 2003 in Xicheng District of Beijing, the Arbitration Commission had 80 cases involving violation of women workers' rights ("in their special physiological periods"). *Mother or Worker: Chinese Women Face New Challenges*, *supra* note 260.

Opportunity Commission (EEOC); created under Title Seven of the Civil Rights Act (CRA).²⁸¹ The administrative procedure requires that a charge must first be filed with the EEOC prior to litigation,²⁸² and the law calls for an EEOC investigation, an attempted conciliation where a purported violation is found, a right to a hearing after an EEOC complaint is filed, and the right to litigate notwithstanding the agency's action or inaction.²⁸³ In 2004, the EEOC dealt with 79,432 charges, settling 8,865 disputes and litigating 414 cases itself.²⁸⁴

2. Proving Discrimination

Proving discrimination in China does not involve the complex burdens of proof and production, and the rules of evidence it does in the United States.²⁸⁵ In China, labor disputes brought into labor arbitration proceedings require an initial application for arbitration, including a submission of any evidence and the names and addresses of witnesses.²⁸⁶ Mediation and an arbitration hearing then follow, and the arbitration tribunal follows the opinion of the majority.²⁸⁷ Under working rules issued by MOLSS, the parties present their own cases, but the regulation is silent as to proof requirements.²⁸⁸ Local arbitration regulations seem to parallel this approach; for example, Beijing regulations require that each party "provide evidence for his own contentions" and "an award shall be made according to the opinions of the majority of arbitrators."²⁸⁹

In China, the courts hear labor dispute cases *de novo* following an appeal from the decision of the labor arbitrator, and the usual rules of civil procedure apply.²⁹⁰ Most of China's employment discrimination cases are brought under the arbitration regulations and Civil Procedure Law (CPL), and the Supreme People's Court has issued an interpretation that in certain labor disputes the employer has the burden of production:

²⁸¹ Civil Rights Act of 1964, § 705, 42 U.S.C. § 2002e-4 (2005).

²⁸² 29 C.F.R. 1601.28(a)(3)-(4).

²⁸³ LEWIS & NORMAN, *supra* note 91, at 199-252.

²⁸⁴ THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT STATISTICS AND LITIGATION, <http://www.eeoc.gov/stats/enforcement.html> (last visited Feb. 28, 2006). Most cases are litigated by the parties.

²⁸⁵ For a detailed explanation of the U.S. approach, see LEWIS & NORMAN, *supra* note 91, at 114-197.

²⁸⁶ Regulations on Settlement of Labor Disputes in Enterprises, *supra* note 240, at art. 24(3).

²⁸⁷ *Id.* arts. 27-29.

²⁸⁸ Arbitration Guidelines, *supra* note 273, at art. 27.

²⁸⁹ Beijing Arbitration Measures, *supra* note 250, at arts. 19, 22.

²⁹⁰ 中华人民共和国民事诉讼法 [Civil Procedure Law] art. 153 (promulgated by the Standing Comm. Of Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991) (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=12610.

In the event of labor disputes arising from the decision made by the employing work unit to discharge, expulse, dismiss, cancel the labor contract, reduce the labor remuneration or to calculate the length of service, the employing unit shall be liable for the burden of producing evidence.²⁹¹

Recent guidance from the Supreme People's Court further provides that in civil cases generally, certain rules of evidence and procedure regulate proofs and burdens.²⁹² Under China's CPL, the claimant must prove his or her case by what some might liken to a "sufficiency of the evidence" standard,²⁹³ with labor arbitration tribunals employing a similar standard.²⁹⁴ Evidence in court proceedings comes in many forms and is organized under the CPL into seven different categories.²⁹⁵

In sum, to pursue an employment discrimination case in China, one must first have a labor dispute arising from an employment relationship in order to even access arbitration or the courts. In addition, guidance is sparse as to proving discrimination.²⁹⁶ The results, however, are straightforward: in most cases the parties present their evidence, the tribunal rules unanimously or by a majority, presumably (though not explicitly) basing its ruling on a standard akin to a sufficiency of the evidence standard. In cases where the employer has the burden of

²⁹¹ Interpretation on Labor Arbitration, *supra* note 241, at art. 13.

²⁹² Generally, plaintiff has the burden of proof to present evidence, and the court shall not consider any evidence unless it is cross-examined in court proceedings. See 最高人民法院关于民事诉讼证据的若干规定 [Regulations of Supreme People's Court on Civil Trial Evidence] arts. 2, 47 (promulgated by the Sup. People's Ct., Dec. 21, 2001, effective Apr. 1, 2002) 01/2002(1) 最高人民法院公报 [SUP. PEOPLE'S CTS GAZ.] 19 (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=38863 [hereinafter Regulation on Civil Trial Evidence].

²⁹³ Claimant has the obligation to produce evidence. Civil Procedure Law, *supra* note 290, at art. 64 (1991). For the standard of proof, the People's Supreme Court ruled that "evidence should be sufficient to establish undisputed facts." Regulation on Civil Trial Evidence, *supra* note 292, at art. 63. Under the Administrative Procedure Act, the court may rule on the "adequacy of essential evidence." 中华人民共和国行政诉讼法 [Administrative Procedure Law] art. 54 (promulgated by the Standing Comm. of Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1990) (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=8970.

²⁹⁴ Beijing Arbitration Measures, *supra* note 250, at arts. 19-20.

²⁹⁵ Civil Procedure Law, *supra* note 290, at art. 63. These categories are (1) documentary; (2) material; (3) audio-visual; (4) testimony of witnesses; (5) statements of the parties; (6) expert conclusions; (7) records of inspection. *Id.*

²⁹⁶ The use of evidentiary and procedural devices to prove discrimination, such as *prima facie*, disparate treatment, disparate impact, mixed motives, affirmative defenses, and burdens of proof, all seem possible to use, though there is little legislative guidance.

producing evidence, the employer may lose due to a failure of production.²⁹⁷

In the United States, illegal discrimination under anti-discrimination laws may generally be proven as intentional or direct (shown by "disparate treatment"), or as unintentional or indirect (shown by a "disparate impact").²⁹⁸ In proving discrimination under either standard, complainants usually must present a prima facie case, and case law has developed various burdens of production in terms of evidence and the weight of proof, the latter burden resting on the claimant and requiring a preponderance of the evidence.²⁹⁹

Besides the procedural issues mentioned above, in China, other practical issues remain before discrimination is proved, such as identifying the basis of the discrimination. For example, while invidious discrimination might be readily evident, differentiation based on migrant worker status may be less apparent. If migrant workers are not paid wages for three months and the employer, though in violation of wage laws, justifies its action by using the non-payment as a means of financing his construction project, what is the basis of discrimination? Is their complaint based on a potential protected status such as ethnicity, race, social origin, or, is it based upon the employer-stated business justification?³⁰⁰ Of course, if non-migrant workers are paid and migrant workers are not paid, or if a more qualified migrant worker is not promoted, the basis is more clearly based on their status, either migrant worker or social origin.³⁰¹

3. Remedies

Though China's labor laws provide numerous remedies for violations, there are none specifically for employment discrimination based on race, ethnicity, or religious belief. The Labor Law authorizes

²⁹⁷ Administrative Procedure Law, *supra* note 293, at art. 6. It appears sufficient for the plaintiff to prevail where the government has failed its burden of production, arguably, even without a prima facie case. It should be noted that the shift of burden of proof applies to civil litigation in people's court. *Id.* art. 1. It is silent as to whether the rule also applies to other administrative hearings.

²⁹⁸ An example of intentional discrimination is shown by giving a man higher wages than a woman for equal work. An example of the second is shown by a height minimum for applicants that screens a disproportionate number of applicants of a "protected status", such as women and Asian-Americans who statistically tend to be shorter. LEWIS & NORMAN, *supra* note 91, at 164-259.

²⁹⁹ *Id.* at 128-56.

³⁰⁰ Of course, under all scenarios a worker who is not paid for whatever reason is entitled to be paid under a wage claim.

³⁰¹ The difficulty with protecting non-invidious categories of workers, such as social origins, is that society and social statuses (e.g., migrant workers) change over time. If they are to be protected, labor reformers must be vigilant to remove the protection at the point it is no longer viable.

compensation for “any harm done to female staff and workers,”³⁰² and also provides remedies for other labor law violations, such as non-payment of wages for overtime, and presumably the same remedy would apply if the violation was based on a protected status such as gender.³⁰³ Additionally, where an employer’s rules and regulations violate the law, the Labor Bureau shall enforce the laws and the employer shall be liable for compensation.³⁰⁴ For other HRM decisions, such as the discriminatory denial of promotions or layoffs, it seems the arbitrator or judge must fashion an appropriate remedy.

Provisions dealing with China’s individual labor contracts, contained in the Labor Law, provide damages for the employer’s non-performance of duties, such as the failure to pay wages or other work conditions promised in the contract.³⁰⁵ The contract provisions of the Labor Law do not contain separate anti-discrimination provisions, though they do limit the employer’s ability to terminate an employee during a pregnancy or nursing period, or for being female generally.³⁰⁶

Remedies under the Women’s Rights Law for discriminatory hiring,³⁰⁷ wages,³⁰⁸ or promotion practices³⁰⁹ include administrative

³⁰² Labor Law, *supra* note 19, at art. 95. For harm done to female workers, the maximum penalty is ¥3000 (\$365) per incidence. See 违反《中华人民共和国劳动法》行政处罚办法 [Administrative Penalties for Violations of Labor Law] art. 13, (promulgated by the Ministry of Labor., Dec. 26, 1994, effective Jan. 1, 1995) (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=21469.

³⁰³ Labor Law, *supra* note 19, at arts. 12, 13, 91; Administrative Penalties for Violations of Labor Law, *supra* note 302, at arts. 12-14. The administrative penalties apply to all the “employment units” defined under the labor law. For certain types of gender discrimination, penalties apply in addition to an order to correct the violation. *Id.* arts. 12-14. For violations of the labor contract, an order to correct it is provided. *Id.* art. 16.

³⁰⁴ Labor Law, *supra* note 19, at art. 89.

³⁰⁵ 违反《劳动法》有关劳动合同规定的赔偿办法 [Measures Governing Compensation for Losses Resulting From Violation of Labor Contract] art. 3 (promulgated by the Ministry of Labor, May 10, 1995, effective May 10, 1995) (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=22531; 上海市劳动合同条例 [Shanghai Labor Contract Regulation] art. 55 (promulgated by the Standing Comm. of the Shanghai Municipality People’s Cong., Nov. 15, 2001, effective May 1, 2001) (P.R.C.), available http://www.chinacourt.org/flwk/show1.php?file_id=51174.

³⁰⁶ Labor Law, *supra* note 19, at arts. 19, 29(3). Where violations of the Labor Law occur and punishment is provided by other laws or administrative rules or regulations, those provisions “shall apply.” *Id.* art. 105. Whether the other remedies are supplemental or preemptive would appear to require an interpretation.

³⁰⁷ Women’s Rights Law, *supra* note 135, at art. 22.

³⁰⁸ *Id.* art. 23.

³⁰⁹ *Id.* art. 24.

sanctions³¹⁰ and damages if its action harmed the woman's property interests.³¹¹

China's 2004 Labor Inspection Regulations require labor bureaus to supervise employer compliance with labor laws, regulations and rules, and contain administrative and monetary penalties to be administered against violators.³¹² These regulations do not include a general anti-discrimination requirement, but do include specific provisions relating to female employees. In this regard, the Labor Inspection Regulations have the authority to ensure "the employing entities' obedience of provisions on special labor protection of female employees and underage laborers."³¹³

Attorney fee costs in China are normally borne by the parties themselves.³¹⁴ Some have claimed that there are relatively few labor lawyers in China primarily due to the inability to recover fees in labor cases.³¹⁵ Interestingly, the number of attorneys representing employers on labor and employment issues, though higher than those for employees, is still low. This is likely not because of an inability to be paid for legal counsel, but because many employers do not sense the relevancy of labor laws nor fear their enforcement.³¹⁶

Remedies for violations of anti-discrimination prohibitions appear to be rather mild in China when compared with those in the United States, which include compensatory and punitive damages, back pay, front pay, restored benefits, attorney's fees, reasonable accommodation, reinstatement, and job offers.³¹⁷ In the United States, punitive damages may also be included, wherein victims are awarded sums deemed

³¹⁰ *Id.* art. 50. Violations of Articles 59-63 of the Labor Law are covered by Administrative Penalties for Violations of Labor Law, *supra* note 303, at art. 12, and by 劳动保障监察条例 [Regulations on Labor Security Supervision] art. 11(4) (promulgated by the Standing Comm. of the Nat'l People's Cong., Nov. 1, 2004, effective Dec. 1, 2004) (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=97457. These stipulations are silent regarding violations of Article 12 of the Labor Law.

³¹¹ Women's Rights Law, *supra* notes 135, at art. 56 (now also including sexual harassment, *id.* art. 40).

³¹² Regulation on Labor Security Supervision, *supra* note 310, at arts. 23-32. There is no right to compensation or other remedy provided to complainants.

³¹³ *Id.* art. 11(4).

³¹⁴ 律师服务收费管理暂行办法 [Interim Regulation on Attorneys' Fee] art. 3 (promulgated by the State Planning Comm. & the Ministry of Justice, Mar. 1, 1997, effective Mar. 1, 1997) (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=27660 (available by subscription only).

³¹⁵ Interview with Junlu Jiang, Chair, Labor Committee of All China Lawyer's Association (ACLA), in Beijing, P.R.C. (June 1, 2005) (on file with author).

³¹⁶ *Id.*

³¹⁷ Such remedies may also be applied against labor unions and employment agencies. LEWIS & NORMAN, *supra* note 91, at 519, 525-54.

sufficient to punish and deter employers determined to have intentionally violated labor laws.³¹⁸

The award of attorney fees to the prevailing party is built into anti-discrimination legislation in the United States, and is used both as an incentive to claimant's lawyers to take discrimination cases and to substitute them as a "private attorney general," to more efficiently enforce the nation's labor laws in conjunction with often over-burdened government enforcement agencies.³¹⁹ As a general rule, attorneys' fees may be awarded to the prevailing plaintiff under a variety of anti-discrimination laws.³²⁰ Attorneys in the United States also can use a contingency fee arrangement as means of compensation, allowing them to receive a percentage of the plaintiff's remedy.³²¹ The U.S. Supreme Court has held that the provision for the statutory award of fees does not

³¹⁸ *Id.* at 256-298. For example, the Eleventh Circuit upheld a jury verdict of \$17 million on racial discrimination claims of seven Caucasian librarians. *Bogle v. McClure*, 332 F.3d 1347 (11th Cir. 2003), *cert. dismissed*, *McClure v. Bogle*, 540 U.S. 1158 (2004).

³¹⁹ Award of Attorney Fees in Job Discrimination Cases, 45C AM. JUR. 2D *Job Discrimination* § 2768 (2003). In civil rights action, the U.S. District Court for the Southern District of New York awarded plaintiffs attorney fees of totaling \$118,968, consisting of \$79,312 based on some 809 hours of work at rates varying from \$95 to \$105 per hour, plus a 50% "bonus" of \$39,656 to compensate for the complexity of the case, the novelty of the issues, and the "great benefit" achieved. The Second Circuit affirmed. The Supreme Court affirmed the attorney fee award, holding that court is authorized, in its discretion, to allow a prevailing party an upward adjustment in attorney fees in cases of exceptional success. *Blum v. Stenson*, 465 U.S. 886, 897 (1984). In a recent example, a California Court of Appeals affirmed a \$470,000 attorney fee award when employee prevailed in a racial discrimination suit in which she obtained a \$400,000 judgment. *Jonathan Vo v. Las Virgenes Municipal Water District*, 79 Cal.App.4th 440 (2000).

³²⁰ For example, Title VII of the Civil Rights Act of 1964, §§ 701-718, 42 U.S.C. §§ 2000e-2000e(17) (2005); the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 (2005); the Equal Pay Act, 29 U.S.C. § 206 (2005); the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2005); the Immigration Reform Control Act, 8 U.S.C. §§ 1324a-1365 (2005); the Employee Polygraph Protection Act, 29 U.S.C. §§ 2001-2009 (2005); the Family Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2619, 2631-2654 5 U.S.C. §§ 6381-6387 (2005); and the Equal Access to Justice Act, 5 U.S.C. § 504 (2005).

Under the Civil Rights Attorney's Fees Award Act, federal district court judges have discretion to award attorney fees. The Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 (2005); *see also, e.g.,* *Vocca v. Playboy Hotel of Chicago, Inc.*, 686 F.2d 605, 606 (7th Cir. 1982). The fee may be awarded even where a complainant prevails through settlement rather than litigation. *Maier v. Gagne*, 448 U.S. 122 (1980). Litigation costs may also be awarded to a prevailing party under Civil Procedure Rule 54(d)(1). FED. R. CIV. P. 54(d)(1); this includes frivolous litigation. It's worth noting that in the United States, even prevailing defendants may occasionally be awarded attorney fees under the Civil Rights Attorney Fees Awards Act. 42 U.S.C. § 1988(b) (2005). Also, the Federal Rules of Civil Procedure authorizes sanctions, principally in the form of fee awards, against responsible persons, if the court determines that legal documents are not "well grounded in fact and . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." FED. R. CIV. P. 11.

³²¹ WILLIAM BURNHAM, INTRODUCTION TO THE LAW OF THE UNITED STATES 142 (3d ed. 2002).

invalidate a contingent fee agreement that would require a prevailing plaintiff to pay attorney fees more than those awarded under the statute.³²²

In the United States, it is believed that such strong remedies and the awarding of attorney fees provide meaningful incentives to enforce anti-discrimination laws, even above and beyond what the government supervision and enforcement can deliver.³²³ China has not yet created these types of incentives for employers, employees, or labor law attorneys. Some argue that without such incentives or sufficient remedies it will remain difficult to enforce labor laws.³²⁴

4. External Incentives

The possibility of losing business opportunities because of labor practices below many international standards is proving an incentive to comply with the labor laws to some Chinese businesses.³²⁵ For example, Social Accountability (SA8000) is a voluntary set of labor standards used to ensure just and decent working conditions in the workplace, and is monitored by Social Accountability International (SAI),³²⁶ a New York-based institution which is now on location in thirty-six countries and in five industries.³²⁷ Pursuant to the SA8000 certification procedure, Chinese companies can have their factories certified by certification bodies accredited by SAI; certifications remain valid for three years and subject the company to surveillance audits either every six months or

³²² The Court has distinguished payment of fees to the prevailing party under 42 U.S.C. §1988 from payment to the attorney under a contingent fee agreement. *Venegas v. Mitchell*, 495 U.S. 82 (1990).

³²³ 45C AM. JUR. 2D *Job Discrimination* § 2692.

³²⁴ 姜涛, 性别歧视: 就业路上一道坎 [Jiang Tao, *Gender Discrimination: Obstacle to Female Workers*], 中国教育报 [CHINESE EDUC. NEWS], Apr. 12, 2005, at 1, available at <http://www.jyb.com.cn/gb/2005/04/12/zy/jryw/7.htm>.

³²⁵ Chua Chin Hon, *China Comes to Grips with New Labour Standards*, STRAITS TIMES (Singapore), July 17, 2004, available at Lexis, News, The Straits Times.

³²⁶ SOCIAL ACCOUNTABILITY INTERNATIONAL, SOCIAL ACCOUNTABILITY 8000, § V (2001), available at <http://www.sa-intl.org/index.cfm?fuseaction=document.showDocumentByID&nodeID=1&DocumentID=136> (last visited Feb. 28, 2006).

Social Accountability 8000 (SA8000), designed as a labor standard, is premised on existing International Standardisation Organisation (ISO) quality standards. The ISO is a non-governmental organization, but composed of national standards institutes. It has developed more than 11,000 international uniform standards to facilitate international exchange of goods and services, but has recently developed ISO 9000 (quality assurance systems management) and ISO 14000 (an environmental systems management), both of which constitute generic standards applicable to a wide range of industries and services.

Ilias Bantekas, *Corporate Social Responsibility in International Law*, 22 B.U. INT'L L.J. 309, 338 n. 133 (2004).

³²⁷ Hon, *supra* note 325.

once a year.³²⁸ The standards used are based on ILO labor standards and the United Nations' Declarations and Covenants.³²⁹ Reportedly, many major companies in China now use SA8000, including Toys R' Us, Timberlake, and Avon.³³⁰ As of 2004, "fifty-four Chinese companies [have been] certified out of 400 companies worldwide which have the certification."³³¹ The business incentive is the expectation that certified companies will be first in line for business opportunities, most likely from U.S. investors.³³²

SA8000's Social Accountability Requirements Section IV on discrimination reads as follows:

5.1 The company shall not engage in or support discrimination in hiring, remuneration, access to training, promotion, termination or retirement based on race, caste, national origin, religion, disability, gender, sexual orientation, union membership, political affiliation, or age.

5.2 The company shall not interfere with the exercise of the rights of personnel to observe tenets or practices, or to meet needs relating to race, caste, national origin, religion, disability, gender, sexual orientation, union membership, or political affiliation.

5.3 The company shall not allow behavior, including gestures, language and physical contact, that is sexually coercive, threatening, abusive or exploitive.³³³

Other provisions require the certified company to control suppliers, subcontractors, and sub-suppliers.³³⁴ The sanction for non-compliance

³²⁸ See SOCIAL ACCOUNTABILITY INTERNATIONAL, GUIDANCE ON PURSUING SA8000 CERTIFICATION OF FACILITIES, available at <http://www.sa-intl.org/index.cfm?fuseaction=page.viewPage&PageID=617&What%20does%20SA8000%20certification%20mean?&stopRedirect=1> (last visited Feb. 28, 2006).

³²⁹ *Id.*

³³⁰ Hon, *supra* note 325.

³³¹ *Id.* Others report forty-nine companies in China. SPARKICE INC. (BEIJING), THE COSTLY SA8000 IN CHINA(2), Sept. 22, 2004, <http://www.sparkice.com/sparkiceApp/spcontrol/ecIDPViewNewsDetails?newsId=364>.

³³² China Daily estimated the cost for first time accreditation and subsequent reviews for three years for a Chinese company with 1500 employees would be about ¥230,000 (US\$27,811), which is about US\$19 per employee. *SA8000 Requires Positive Attitude*, CHINA DAILY, July 6, 2004, http://english.people.com.cn/200407/06/eng20040706_148628.html.

³³³ SOCIAL ACCOUNTABILITY 8000, *supra* note 326, at § IV.5.

³³⁴ *Id.* § III.9.6.

presumably would be ineligibility and loss of business with any U.S. company requiring certification. Whether these external standards and market-imposed sanctions will prove effective in lessening illegal discrimination, or prove to be mere public relations window dressing remains to be seen.

IV. CONCLUSION

A. Challenges to Remediating Employment Discrimination

There are currently at least three immediate challenges to addressing the problem of employment discrimination in China.

First, there is a need to educate society in general about the problems of discrimination. Every society has problems with some citizens excluding others from opportunities for education, housing, welfare and jobs, and such exclusion may be for invidious or other reasons. Discrimination takes a large social and economic toll. It is estimated that in the United States, gender and racial job discrimination wastes the talents of many, causes social divisions and disharmony, and costs US\$194 billion a year.³³⁵ The battle against discrimination takes place in many forums, but perhaps none are as important as education, where citizens must be provided information to combat the exclusionary stereotypes that women are inferior to men, that age determines ability, and that race and ethnicity determine competency. However, as important as education is in the United States, it was determined that employment needed significant legal protection, and the EEOC was established to protect equal economic opportunity. Without a sufficient "living wage," other opportunities such as housing and education become even more distant.

China's employment discrimination comes from historical and cultural mores which are exacerbated by the country's present economic transition to a market economy. Economic development, privatization, and the need to be profitable all argue for cutting costs (often labor costs)

³³⁵ The 194 billion dollars reflects the cost of discrimination in terms of employee's lost income. The actual number is calculated by: (1) projecting a percentage of earning differentiations by race and by gender, (2) applying the percentage to aggregate national earnings, and (3) adjusting the combined cost of sexual and racial discrimination in 1987 dollars. RALPH ESTES, STAKEHOLDER ALLIANCE, THE COST OF DISCRIMINATION, <http://www.stakeholderalliance.org/discrimination.html> (last visited Feb. 28, 2006).

In China, costs to society in terms of government costs and legal aid services to recuperate ¥100 billion (US\$12 billion) in migrant worker claims for back wages have been put at ¥300 billion (US\$36 billion). 崔丽, 追讨 1000 亿元欠薪, 需支付 3000 亿元成本 [Cui Li, *It Costs 300 Billion to Collect Back Wages of 100 Billion*], 中国青年报 [CHINA YOUTH DAILY], June 9, 2005, http://zqb.cyol.com/gb/zqb/2005-06/09/content_15960.htm [hereinafter Cui Li].

and pulling away from the welfare state's iron-rice bowl approach. Therefore, one of the main challenges facing China is the long-term education of the population regarding the fallacies of discrimination, as well as its costs and dangers to society.³³⁶ This must be combined with strongly-enforced anti-discrimination laws, which "educate" employers by making them pay for their violations.

Education and easy access to information about labor rights and remedies is essential and must be provided to employees. The easiest and most logical place for this information is at the workplace. Posters outlining rights, remedies and government contracts must be made available to workers for meaningful access to labor rights to exist, as required by SA8000.³³⁷ Special training sessions can also be provided by trade unions,³³⁸ by governments, or by NGOs. For example, in Shanghai, it is reported that migrant construction workers must pass classes on how to protect their legal rights in order to get a certificate allowing them to work in the city.³³⁹ The need for the government to intervene to bring about changes in society cannot be understated.³⁴⁰

A second challenge arises from China's transition to a market economy and the resulting inequities. The societal disruption brought about by economic transition, causing discrimination, must be managed by the government's guiding hand through legislation allowing all citizens to participate more equally in the economic benefits brought on by the transition. This requires more than policy pronouncements—it requires enforceable anti-discrimination laws and procedures that are able to stop law violators and provide effective remedies for the victims.

A third challenge is the inconsistency too often found in law enforcement. Part of the difficulty is systemic of China's political legal system wherein national legislation is general in nature, leaving the task

³³⁶ For example, the Law School of Beijing University has created a working group on protection of women's labor rights, dedicated to the general public for long term education regarding job discrimination. More information on the working group is available at <http://www.woman-legalaid.org.cn/group/index.php> (last visited Feb. 24, 2006). Also, for the costs to the victims in seeking redress, it has been estimated that "for some migrants, it requires hundreds, even thousands of RMB in transportation, food, lodging, and other costs just to report a case." Cui Li, *supra* note 335.

³³⁷ SOCIAL ACCOUNTABILITY 8000, *supra* note 326, at § IV.9.12.

³³⁸ *Id.* § IV.9.5.b.

³³⁹ Yang Lifei, *Migrants Learn About Legal Rights*, SHANGHAI DAILY, Apr. 19, 2005, at 3, available at <http://www.china.org.cn/english/null/126305.htm>.

³⁴⁰ For discussion on the influence of the role governments, there is some evidence of different treatment in China and Vietnam of workers under Taiwanese-managed factories that arguably is attributable to the different roles played by the governments. See Anita Chan & Hong-Zen Wang, *The Impact of the State on Workers' Conditions-Comparing Taiwanese Factories in China and Vietnam*, 77 PACIFIC AFFAIRS 629 (2004).

of passing detailed implementing regulations to local governments.³⁴¹ These local laws tend to be slow in coming, too often are as general as the national law, are not always consistent, and too frequently lack meaningful government enforcement.³⁴² The 2004 Labor Inspection Regulation empowers the government to supervise employer compliance with labor law requirements,³⁴³ however, the Regulation's pertinent part delegates enforcement:

The labor security administration of a local people's government at the county level or at any level above shall be in charge of the labor security supervision work within its own administrative area.³⁴⁴

Thus, it would seem that the enforcement approach is somewhat circular, with local governments given responsibility to pass implementing legislation against their local business constituents and to provide meaningful processes and penalties against those businesses that violate anti-discrimination laws. Many local governments pass regulations, but those regulations are often no more enforced than the national regulation.³⁴⁵

Related to these challenges is the relative unavailability of legal assistance. Chinese labor lawyers, unlike their commercial lawyer counterparts, have little incentive to take on the cases of victims of illegal employment discrimination.³⁴⁶ The lawyer fees for such cases are low, victims are often without financial means increasing the likelihood that the lawyers may not be paid at all, the cases can be complex, and the employer always has the right to appeal to the court for a *de novo* trial following an arbitration decision them. All these factors present formidable challenges to the meaningful enforcement of anti-discrimination laws in China.

³⁴¹ DANIEL C. CHOW, *THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA* 153 (2003).

³⁴² See Legislation Law, which is established to deal with the central-local inconsistencies, but there is little evidence of its widespread use in formal procedures.

³⁴³ Regulation on Labor Security Supervision, *supra* note 310.

³⁴⁴ *Id.* art. 3.

³⁴⁵ M. Ulric Killion, *Post-WTO China: Quest for Human Right Safeguards in Sexual Harassment Against Working Women*, 12 TUL. J. INT'L & COMP. L. 201, 234 (2004).

³⁴⁶ It is reported that lawyers charge substantially less in representing employees in labor rights litigations than they do in representing the employers. See 韦蔡红, 上海律师薪酬调查 [Wei Caihong, *Survey on Attorneys' Income in Shanghai*], 新闻晨报 [MORNING DAILY NEWS], June 17, 2004, <http://edu.sina.com.cn/1/2004-06-17/73215.html>.

B. *Clarifying China's Anti-Discrimination Laws*

Some reforms to China's anti-discrimination labor laws are in order. Suggested clarifications to existing anti-discrimination laws are made below, and seek to address some of the legal inefficiencies in China's current attempt to combat discrimination in the workplace, as well as satisfy its commitments to meet and maintain international labor standards.

1. "Protected Classes" of Workers

The definitions of protected classes of workers should be more clearly stated. Currently, those workers protected by some type of anti-discrimination law must look to a variety of laws and institutions to determine their rights. Further, the rights of some groups are more clearly protected than those of others. For example, while race, ethnicity, gender, and religious belief are protected by the Labor Law, for workers who are disabled or have hepatitis B or other medical ailments, a search to other laws (that often provide even less protection) is required. Race carries with it some question as to whether it stands alone, or *de facto* includes national minorities, social origin, etc. In its reports to the United Nations, China often discusses all three of these categories and its progress therein under the broad category of race, yet there seems to be a scarcity of labor disputes reported dealing with race specifically.

The scope of the coverage for protected classes also should be clarified. For example, the Women's Rights Law purports to protect female applicants, while Labor Law only protects female employees.³⁴⁷ Disabled workers have varying rights in public and private employment, and those with certain medical ailments may be protected differently as civil servants than elsewhere. The individual labor contract provisions found in the Labor Law do not expressly mandate provisions prohibiting illegal discrimination except as to women.

Though China might consider expanding its categories of protected classes to better fall in line with international standards, the breadth of coverage—that is, whether to include age, health, and migrant workers, etc.—is a discretionary matter left to the national legislature. And legislative coverage varies widely among countries.³⁴⁸ While lawyers in China can successfully search the anti-discrimination laws and determine protected status, it is doubtful whether average citizens or

³⁴⁷ Women's Rights Law, *supra* note 135, at art. 22; Labor Law, *supra* note 19, at art. 2.

³⁴⁸ CATHERINE F. HALVORSEN & DIANA C. JAQUE, KEEPING UP WITH NEW LEGAL TITLES: BELL, MARK, ANTI-DISCRIMINATION LAW AND THE EUROPEAN UNION 2-15 (2002).

employers can easily find access or answers to the necessary information regarding coverage and application of these legal rights and duties, and, more importantly, whether victims can therefore have adequate redress.³⁴⁹

2. "Labor Disputes" and Legislative Rights of "Applicants"

Chinese law requires a labor dispute arising out of an employment relationship before a remedy for discrimination can be requested from the arbitration commission or the courts.³⁵⁰ By definition, therefore, job applicants are not employees and are thus excluded from meaningful enforcement.

The courts also require the claim to arise from a labor dispute unless otherwise authorized in accordance with law.³⁵¹ There are three anti-discrimination provisions which arguably could qualify for a court hearing because they are "otherwise authorized." The first comes from the Regulation of Labor Market Management which prohibits discrimination in recruitment, but provides only administrative penalties without specific remedies to the victim of such a violation.³⁵² The second comes from the Women's Rights Law which authorizes direct court access in accordance with the law under Articles 48-49.³⁵³ The third is the Disability Law, which provides for a lawsuit in court.³⁵⁴ The question here is two-fold: does the phrase "in accordance with the law" require the victim in a hiring discrimination case to first have a "labor dispute" (that could only possibly arise from an actual employment relationship), or does it mean the court will accept the direct appeal, thus bypassing labor arbitration? Further, if the court allows for direct appeals, what remedies

³⁴⁹ In the United States, protected classes also arise from a variety of laws, but in recent years there has been a general (but not fully inclusive) coalescence of enforcement under one national administrative agency (the EEOC) responsible for investigation of claims under many of these laws and for prosecution. LEWIS & NORMAN, *supra* note 91, at 199-252. States are permitted to pass similar legislation that must be substantially similar or broader, but it may not undercut rights and duties under the national law, a principle enforced under the courts. By contrast, China uses one agency (labor bureaus) to enforce all labor disputes, including employment discrimination.

³⁵⁰ The People's Supreme Court explains that arbitration committees can only take the cases involving disputes arising from "labor relationship defined under Article 2 of Labor Law". Interpretation on Labor Arbitration, *supra* note 241, at art. 1. Labor Law defines labor relationship as "all enterprises, individual economic organizations (hereinafter referred to as "employers"), and workers bound up by contractual employment." Labor Law, *supra* note 19, at art. 2.

³⁵¹ Labor Law, *supra* note 19, at arts. 77 and 79.

³⁵² Regulations on Labor Market Management, *supra* note 21, at arts. 34-38.

³⁵³ Women's Rights Law, *supra* note 135, at arts. 48-49.

³⁵⁴ Law on the Protection of Disabled Persons, *supra* note 103, at art. 49.

will be granted?³⁵⁵ There appears to be little legal guidance on this issue of justiciability.³⁵⁶

More specifically, China might clarify its labor laws by legislatively extending the rights against unlawful discrimination to include applicants, perhaps in the Labor Law or by supplementary regulations. A second technique for clarification on this issue could be to interpret the anti-discrimination laws to apply to individuals, which would thereby include applicants for jobs. A third way to approach the lack of access to remedies for applicants under anti-discrimination laws is to clarify “labor dispute” to include applicants, even though such cases do not arise out of an existing employment relationship.

3. Enhancing Enforcement: Remedies as Deterrent and Incentive

Certain self-help remedies are available to workers. First, through their trade unions, non-discrimination clauses can be negotiated into collective contract terms. These terms can also provide for a greater number of protected classes—including disability, health and migrant status—than do current statutes. These contract protections create rights that are supplemental to those within labor statutes and provide labor rights that can be enforced by the labor arbitration commission.

Consideration could be given to creating grievance procedures internal to the enterprise, utilizing a private third-party arbitrator (or “outside” mediator) to expeditiously resolve claims of employment discrimination. This method would lessen potential liabilities and bring a

³⁵⁵ Article 56 of Women’s Rights and Interests Protection Law mandates that perpetrator shall be liable for “property or other damages” as a consequence of his discriminatory conduct. Women’s Rights Law, *supra* note 135, at art. 56. However, the law is silent on the types, amount, and payment of those damages. Furthermore, Article 56 allows the victim to look to other laws to determine the amount of damages, if the situation is explicitly covered by other law or regulations. *Id.* Therefore, local labor regulations or other administrative rules may be dispositive in a discrimination case.

Under the Administrative Penalties for Violations of Labor Law, fines of ¥3,000 (US\$365) may be levied for violation of enumerated women’s rights (not other areas of employment discrimination). See Administrative Penalties for Violations of Labor Law, *supra* note 302, at arts 12-14. But there is no compensation for the victim, except in wage claims. *Id.* art. 6). All fines are kept by the government. *Id.* art. 20.

³⁵⁶ U.S. anti-discrimination laws avoid this lack of clarity by extending protection to any “individual,” rather than to “employees,” which protects applicants as well as former employees who have suffered discrimination. Civil Rights Act of 1964, § 703, 42 U.S.C. § 2002e (2005). See also discussion in LEWIS & NORMAN, *supra* note 91, at 14-17. Other labor statutes usually interpret the law’s application to “employees” to be extended to applicants, such as in the case of employer discrimination against an applicant because of his or her union beliefs, membership or activities (protected under the statute). See discussion in LEWIS & NORMAN, *supra* note 91, at 14-17.

conclusion that is quicker, less expensive, and more accessible than the use of either labor arbitration commissions or courts.³⁵⁷

Enforcement can be enhanced by strong legislative remedies, which generally serves as both a deterrent to law violators and an incentive to enforce the labor laws. As to the deterrent aspect, profit-motivated employers naturally pay better attention to labor laws when the possibility of large monetary liability exists. Under U.S. anti-discrimination laws this occurs with regularity, and many corporate giants have been held liable for millions-of-dollars in monetary penalties for violations.³⁵⁸ These liabilities, coming in the form of back pay, front pay, compensatory damages, and even punitive damages are thought to act as a deterrent to law-violators.³⁵⁹ It is assumed that a profit-motivated employer will seek to avoid such losses through compliance with the labor laws.

A second function of legislative remedies is to enhance enforcement of anti-discrimination laws by providing incentives through the remedies awarded to victims and their lawyers who prevail in the discrimination complaint. In the United States, one such incentive is to require the law-violator (i.e. the employer) to pay for both the court costs and attorney fees of the prevailing party.³⁶⁰ American court judgments, for example, may award all of the court costs incurred by the prevailing party, including fees for clerks, marshals, witnesses, and filing fees.³⁶¹ Absent specific statutory authorization such as that provided by anti-discrimination labor laws, these costs do *not* normally include the attorney fees of the prevailing party.³⁶² The awarding of attorney fees can serve two purposes. First, it enables a complainant who may be without

³⁵⁷ Article 77 of the Labor Law permits "settlements," as well as mediation, arbitration, and litigation. Labor Law, *supra* note 19, at art. 77. In the United States, private arbitration of collective labor contract claims is the norm; and in recent years there has been judicial acceptance of and deferral to arbitration of certain statutory labor rights, including claims of discrimination, where such arbitration is genuine and not burdensome on the complainant. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

³⁵⁸ A federal jury awarded a former Boeing engineer more than \$2.5 million in an age-discrimination lawsuit against the corporate giant of Boeing Company. The award included \$1.5 million in punitive damages, \$31,000 for back pay, \$625,000 for pain and suffering, and \$370,000 as lost salary as a test pilot. See *Goico v. Boeing Co.*, 347 F. Supp. 2d 986 (D.Kan. 2004).

³⁵⁹ LEWIS & NORMAN, *supra* note 91, at 256-96.

³⁶⁰ *Id.* at 521-47.

³⁶¹ 28 U.S.C. § 1920 (2005).

³⁶² BURNHAM, *supra* note 321, at 239-40. Additionally, there are court rules on offers of judgment by plaintiffs which can promote settlement. The rule is "[I]f a party offers to settle the suit by entry of judgment in a particular amount, the offeree rejects the offer and the result at trial is not at least as favorable as the offer, the rejecting offeree is liable for the actual costs incurred by the offeror after the date of the offer. Thus, if a prompt realistic offer is made early in the suit, successful parties can recover almost all their attorney fees." *Id.* at 240. The rule does not apply if the defendant offeror prevails. *Delta Air Lines v. August*, 450 U.S. 346 (1981).

sufficient funds to find an attorney willing to take their case, and second, it has the effect of monetarily inducing the lawyers to serve as “private attorneys general” in enforcing the labor laws. In the United States, this supplements the government’s use of administrative agencies in enforcing anti-discrimination laws, as well as the self-help methods of private arbitration.

It has been said by some employers in China that labor laws are irrelevant due to the unlikely prospect that employees will complain to the authorities or that the laws will be enforced.³⁶³ Further, there is little evidence to suggest that either the promise of remedies or the threat of penalties enhance enforcement.³⁶⁴ Statutory remedies generally provide compensatory relief with the aim of partially restoring the worker to the economic position he or she would have been in but for the violation,³⁶⁵ and interest on the amount owed the worker generally is due.³⁶⁶ Such situations do not effectively deter most employers, however, as they tend to view such awards merely as a cost of doing business.

Further, labor law remedies provide little or no incentive to promote or enhance the enforcement of the anti-discrimination requirements. There is generally no award of attorney fees to prevailing plaintiffs under the Chinese legal system,³⁶⁷ and fees for worker

³⁶³ In 2004, there were only 260,000 cases in labor arbitration, and a mere 4,047 arbitration cases were appealed and accepted by the People’s Court. Fewer yet likely involved discrimination claims. 2004 STATISTICS, *supra* note 131. See also, 2004 STAT. Y.B. CHINA, *supra* note 195, at § 23-25.

³⁶⁴ For example, in an alleged workplace sexual harassment suit, the People’s Court ordered the wrongdoer to pay ¥2,000 (US\$243) damages for physical and emotional harm. Both parties appealed and the case was affirmed. 四川首例性骚扰案终审 施害人道歉并赔偿 2000 元 [Final Judgment of the First Sexual Harassment Case in Sichuan: the Wrongdoer Apologizes and Pays ¥2000], 新华网[XINHUA NEWS AGENCY], Aug. 9, 2003, http://news.xinhuanet.com/newscenter/2003-08/09/content_1018164.htm.

³⁶⁵ Administrative Penalties for Violations of Labor Law, *supra* note 302, at arts. 12, 13, and 16. For “repeat violators” of the Labor Law, heavier penalties are authorized (two to five times the original amount). *Id.* art. 19. But there is little evidence of the use of heavier penalties.

³⁶⁶ *Id.* art. 6.

³⁶⁷ 赵磊, 民工讨薪 欠薪公司应支付律师费 [Zhao Chu, *When Workers Collect Default Wage, Default Employers Shall Pay the Attorney Fees*], 法制早报 [MORNING LEGAL NEWS], Feb. 13, 2006, at 9, available at <http://www.chinalegalnews.com.cn/legaltimes/20060213/0901.htm>. In a typical civil case, an experienced Chinese attorney will charge a contingent fee around 5%, plus the hourly billing of ¥2000 (US\$243) per hour. When the judgment is rather small, the attorney will charge a minimum fee of ¥5000 (US\$603). For details, see 王媛律师服务收费标准 [Attorney Wang Yuan’s Fee Schedule] (on file with author). Though fees for employers in labor cases are usually based on an hourly basis, such fees for plaintiffs would clearly preclude most victims of discrimination from obtaining legal assistance. For many attorneys that represent plaintiffs, little remuneration is expected or paid, as the legal representation is often pro bono or practically so. Interview with Junlu Jiang, *supra* note 315. In Guangzhou, the “going rate” to charge migrant workers who can pay for legal services is about ¥3,000 per case. Interview with Qiaoyan Huang, lawyer and faculty member, Law Clinic of Sun Yat-sen University Law School, in Guangzhou, P.R.C. (June 3, 2005).

complainants must be negotiated with attorneys on an individual basis and within regulatory fee guidelines.³⁶⁸ Reforms in this area would likely require modifications of anti-discrimination legislation, attorney fee regulations, and, possibly, in-court procedures.

Finally, it is clear that effective laws and their meaningful enforcement still do not always bring a complete end to illegal discrimination in the workplace. This complex problem must be dealt with at many levels of society. But even while that war is being waged, it is certainly comforting to the victims of discrimination to know that they can receive some predictable measure of justice when violations of equal employment occur.³⁶⁹

³⁶⁸ See Interim Regulation on Attorneys' Fee, *supra* note 314; see also CHOW, *supra* note 341, at 236-39. The rules governing the collection of attorneys fee are covered under the recently promulgated 律师事务所收费程序规则 [Procedures for Law Firms Collecting Attorneys Fee] (promulgated by the Ministry of Justice, Mar. 19, 2004, effective May 1, 2004) (P.R.C.), available at http://www.chinacourt.org/flwk/show1.php?file_id=92696.

³⁶⁹ As of July 2005, there is consideration being given to a draft law on Employment Promotion which could include anti-discrimination provisions. Draft provisions could include a clarification of "discrimination" (differentiate, exclude, favor), a broadened scope of protected classes (including resident status, age, and marital status), an extension of rights to applicants, and provisions for compensatory remedies for victims. Employment Promotion Law Draft, *supra* note 17.